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Supreme Court, U.S.
FILED

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No. _____

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL KANE DUNKL And JERRY MAILHOT,

Petitioners,

v.

THE CITY OF SAN DIEGO, And SAN DIEGO PADRES,

Respondents,

On Appeal To The Supreme Court Of California
After A Combined Opinion of the Court of Appeal for the Fourth Appellate District, Division One, No. D035559 and No. D035585 On Appeal From The Superior Court of San Diego County, Hon. Judith D. McConnell, Judge, No. GIC741206 and No. GIC741207

PETITION FOR WRIT OF CERTIORARI

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96 pp

QUESTION PRESENTED

Petitioners, in November of 2000, proposed and commenced circulating a voter initiative in San Diego, California. During the circulation period, the City of San Diego and its joint venture business partner, Padres L.P., filed separate lawsuits naming Petitioners as defendants and seeking a variety of relief affecting the Petitioners as circulators as well as the proposed initiative.

These two lawsuits raise issues regarding the First Amendment's guarantee of the free exercise of the right to petition government for redress of grievances, and the decision of the California courts in the combined cases pose the following question:

> May government or its private sector joint business partner sue proponent/circulators of a voter initiative during the period of circulation prior to the submission of the initiative to government challenging the initiative's validity and/or its circulation?

PARTIES TO THE PROCEEDINGS

Petitioners

Michael Kane Dunkl and Jerry Mailhot. Petitioners are individuals and have no corporate affiliations.

Respondents

The City Of San Diego, California

Padres, L.P., a Delaware Limited Partnership with offices in the City and County of San Diego, State of California

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Petitioners, Michael Kane Dunkl And Jerry Mailhot, seek a writ of certiorari to review the judgment of the California Supreme Court denying their petition for review of a decision of the California Court Of Appeal, Fourth Appellate District, Division One, which affirmed the judgment of the trial court in this matter.

OPINIONS BELOW

On April 25, 2001, the California Supreme Court denied Petitioners' Petition for Review of the California Court of Appeal, Fourth Appellate District, Division One, (*City of San Diego v. Dunkl* 86 Cal. App. 4th 384 (2001). The decision of the California Supreme Court is set forth in the Appendix at p. A-1. The decision of the Court of Appeal is set forth in the Appendix at pp. A-3 - A-29. The ruling of the Superior Court, County of San Diego, State of California, is set forth in the Appendix at pp. A-30 - A-35.

JURISIDICTION

This petition is timely under Supreme Court Rule 13.1 and Rule 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS AT ISSUE

This case raises issues under two amendments to the Constitution of the United States.

> **Amendments Article I.** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to

petition the Government for a redress of grievances.

Amendments Article XIV. Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[1]

STATEMENT OF THE CASE

Throughout the United States voter-sponsored initiatives are under attack. *The Wall Street Journal* expressed the problem as follows:[2]

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[1] Procedural due process rights are implicated when there is a deprivation of constitutionally protected rights, such as freedom of speech and petitioning. *Board of Regents v. Roth* 408 U.S. 564, 569 (1972). The exercise of the initiative power is protected by the First Amendment applied to the states through the Fourteenth Amendment. *Meyer v. Grant* 486 U.S. 414, 420 (1988).

[2] Editorial, *Ducking the Initiative*, THE WALL STREET JOURNAL, September 6, 2000, p. A26.

> Al Gore and George W. Bush are accusing each other of ducking debates. For real ducking, though, check out the local and state officials trying to duck direct democracy by blocking voters from putting initiatives on the ballot. ... .
>
> The ideas of representative government and the right of petition should be viewed as complementary, not antithetical. ... .
>
> Notwithstanding brickbats from elected officials of both parties, the initiative process is overwhelmingly popular. Voters want a final trump card over entrenched incumbents, who often feel free to ignore voters. So it's no surprise to see courts strike troublesome initiatives off the ballot before voters get a chance to even look at them.

The only true and consistent champion of voter initiatives has been this court which in case after case has upheld, rather than eroded, the rights of the people to petition their government. Consequently, Petitioners seek review of one more in a long series of cases by which state courts have struck blow after blow against the people's right to freely petition their government. This court is truly the last resort of popular democracy, and this case presents one of the most egregious examples of the persistent effort to chill participation in the petitioning process.

Statement of Facts And Procedural Issues

Since becoming a National League baseball team in 1969, the San Diego Padres have shared what is now called

Qualcomm Stadium with the San Diego Chargers. In 1996 the City Council appointed a task force to determine whether the Padres needed a separate ballpark in order to remain competitive and to become financially stable, and if so, whether the City should participate in its development.

In 1997, the task force answered both questions in the affirmative. The City Council appointed a second task force in 1997 to recommend both a site and financing alternatives for a new ballpark. Subsequently, in January of 1998, the task force recommended that the proposed new ballpark be located in downtown San Diego and that it be part of a larger redevelopment effort.

These activities finally culminated on August 7, 1998, when the City Council placed Proposition C on the November 3, 1998 ballot. In this Council-generated voter initiative, San Diego voters were asked to approve a Memorandum of Understanding (MOU) establishing the terms of a joint business venture between the City and the Padres for the financing and for the construction of a new ballpark for the Padres. Proposition C was approved on November 3, 1998.

In November of 1999, Petitioners signed, published, and commenced circulating a voter initiative[3] that made a variety of findings that key conditions subsequent set forth in the language of the MOU had not and could not be met. Based on these findings, the initiative provided that the MOU was terminated.

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[3] The language of the initiative is set forth in Appendix pp. A-41 - A-49.

By the end of December of 1999, Petitioners and those assisting them in the petitioning process had collected over 10,000 signatures.

On January 4, 2000, approximately five months prior to the close of the time period for gathering voter signatures in order to qualify the initiative for the ballot, two lawsuits were filed against Petitioners naming Petitioners as defendants.

The actions were brought, respectively, by the City of San Diego and Padres L.P. (the San Diego Padres baseball club, hereinafter the "Padres"), each requesting the following relief from the court:

> **[Relief sought in the City of San Diego's complaint]** [4]
>
> 1. For a declaration that the Proposed Initiative is void because it purports to execute administrative acts rather than initiate legislation;
>
> 2. For an injunction permanently restraining Defendants from filing the Proposed Initiative with the CITY for the purpose of qualifying the measure for a public vote pursuant to San Diego Municipal Code, Division 25;
>
> 3. For costs; and
>
> 4. For all other and further relief the court may deem proper.

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[4] Appendix p. A-40.

[Relief sought in the Padres' complaint] [5]

1. For a declaration that the proposed initiative is invalid and PADRES and CITY have the right to fulfill their obligations under the MOU and Defendants are prohibited from placing the proposed initiative on any ballot or expending any public funds on the proposed initiative;

2. For an injunction enjoining Defendants from placing the proposed initiative on the ballot;

3. For attorneys fees and costs; and

4. For all other and further relief as the court may deem proper.

The impact of lawsuits filed by the City of San Diego and its business partner, the Padres, naming as defendants the proponent/circulators of the proposed initiative was as dramatic as it was immediate. By mid-January, 2000, within weeks of the lawsuits being filed, the support for Petitioners' efforts fell off dramatically; and Petitioners suspended their signature gathering efforts, pending resolution of the legal issues raised by the two lawsuits. Petitioners' effort currently remains suspended.

In responding to the filing of the complaints and to the filing of motions for summary judgment by the City of San Diego and by the Padres, Petitioners filed in each of

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[5] Appendix pp. A-57.

the cases special motions to strike, commonly referred to in California as an "anti-SLAPP" motion.[6]

Petitioners' anti-SLAPP motions sought to strike both complaints for interfering with their rights to petition protected by both the federal and California constitutions.

In their anti-SLAPP motions, Petitioners relied, in particular, on the reasoning of *City of Long Beach v. Bozek* 31 Cal. 3d 527 (1982). The case contains an extensive discussion of California and federal constitutional issues regarding the right to petition government.[7]

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[6] California Code of Civil Procedure section 425.16, subdivision (b), in relevant part provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." The full language of California's anti-SLAPP statute is set forth in the Appendix at pp. A-58 - A-61. An extensive discussion of the scope of the anti-SLAPP statute and its legislative history is found in *Briggs v. Eden Council for Hope and Opportunity* 19 Cal.4th 1106 (1999)

[7] *Wolfgram v. Wells Fargo Bank* 53 Cal App 4th 43, 54 (1997), states: "Bozek has been followed in several cases raising similar concerns about "chilling" a litigant's petition rights." Moreover, in *Bozek* the issue of protecting a citizen's right to petition is specifically discussed in light of several federal cases directly analogous to Appellants'

In its tentative ruling of February 18, 2000, the trial court agreed with Petitioners that their constitutional rights were at issue, stating in pertinent part as follows: [8]

> A Strategic Litigation Against Public Participation Motion (SLAPP motion) is a motion brought for the purpose of declaring an action invalid because it's true intention is to prevent the exercise of one's **First Amendment rights**.
>
> California Code of Civil Procedure section 425.16 is a procedural remedy to dispose of such suits and expeditions manner and thereby protect defendants' free exercise of **First Amendment rights** on matters of public interest. [citation] To protect the constitutional right to petition and free speech, the statute specifically provides that it "shall be construed broadly." [citation] ... . Because the statute is to be interpreted broadly, the court finds defendants have sustained their burden to establish a prima facie case that defendants' conduct is in the furtherance of their respective rights of petition and free speech under the Constitution and are made in connection with the public issue of the ballpark project and ancillary ballpark development. *[emphasis added]*

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case. See, *Bozak*, supra, at 533, e.g., "public activities directed toward influencing state legislatures."

[8] The last of the "tentative" rulings of the trial court in both cases is set forth in the Appendix, pp. A-31 - A-36. Its language comprises in substance the orders granting judgments to the City of San Diego and to the Padres.

However, regardless of the trial court's agreement that First Amendment rights were at issue, the trial court concluded that the constitutional issues were mooted, concluding:[9]

> The SLAPP motion is moot. . . . If the proponents wish to speak out publicly, write letters, or in any other way attempt to influence the public and the city council to take the action proposed here, they may do so, but they may not use the initiative process to express their concerns about any possible findings of the ballpark project unless they clearly do so by a legislative act.

In reviewing and upholding the decision of the trial court, the court of appeal also addressed the Petitioners' anti-SLAPP motion:[10]

> We .... conclude that the trial court correctly determined that the SLAPP motions to strike were moot once the Padres and the City prevailed on the legal questions presented for resolution in the summary judgment proceedings. The court of appeal continues: In attacking both the summary judgments and the SLAPP rulings, the proponents argue they were not properly named defendants in the action, and the city clerk would have been a more appropriate and a more traditional defendant to have been named, based on other election

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[9] Appendix p. A-36.

[10] See discussion at Appendix pp. A-13 - A-20.

challenge cases. [citation] The proponents base this argument both on traditional constitutional protections of the right to petition the *government* for redress, and on their reading of the SDMC. Neither of these arguments is well taken. ... .Nothing in Bozek prevents a public or private entity from seeking in an otherwise authorized action a judicial declaration of the invalidity of a proposed ballot measure, even where private citizens are the proponents of same.

[T]hese defendants were properly named because they were the proponents of the measure and had the necessary interest in the subject matter to be named as parties, such that complete relief could be obtained by naming them as parties. [citation]

In due course Petitioners filed a Petition for Review with the California Supreme Court,[11] but the petition was denied without comment; although, Justice Kennard was of the opinion that the petition should be granted.[12]

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[11] Appendix p. A-1.

[12] Appendix p. A-1. Although no reason was stated, a hint is found in the Justice's dissenting opinion in *Hotel Employees & Restaurant Employees Internat. Union v. Davis* 21 Cal.4th 585 (1999), wherein, at 617, J. Kennard stated: One of the fundamental powers reserved to the people of this state is the power to enact legislation by initiative. This court has recognized the importance of that power: "[T]he initiative power must be liberally construed to promote the democratic process. [Citation.] Indeed it is our solemn

Returning to the facts of the case, in the summer of 2000, a federal grand jury was convened to inquire into *possible corruption of one or more San Diego public* officials in connection with votes on the MOU and various aspects of the City's commitment to financing the ballpark construction.

On January 29, 2001, San Diego City Councilwoman Valerie Stallings, as a consequence of the federal investigation, entered a guilty plea to two criminal actions arising out of a scheme by which she obtained valuable gifts during the years 1996 through 2000 from one of the owners of the Padres, John Moores.

Presently construction of the ballpark project is halted. No date has been publicly announced for construction to recommence.

REASONS FOR GRANTING THE PETITION

The Treatment Of Petitioners' First Amendment Rights By The California Courts Plainly Conflicts With Decisions Of This Court

The primary question raised by Petitioners is easily answered by reference to the many decisions of this court

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duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise.... [A]ll presumptions favor the validity of initiative measures and mere doubts as to validity are insufficient; such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." [citation]

cited in this petition: Government and its business partner *may not sue proponent/circulators of a voter initiative during the circulation period* since reasonable alternatives exist in the law to address legitimate concerns in a timely manner.

Petitioners' Activities Constituted Core Political Speech

The petition circulation activity at issue in this case, while part of the ballot access process, clearly constituted core political speech.

> [T]he circulation of a [voter initiative] petition involves the type of interactive communication concerning political change that is appropriately described as "core political speech." ... [This] speech ... is `at the core of our electoral process and of the First Amendment freedoms,' ... . [Any state action] trenches upon an area in which the importance of First Amendment protections is "at its zenith." *Meyer v. Grant* 486 U.S. 414 (1988), 421-422, and 425.

In *Buckley v. American Constitutional Law Foundation* 525 U.S. 182, 200 (1999),[13] this court closely examined the

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[13] *Buckley* follows a long line of cases handed down by this court in its attempt to protect petitioning rights against attack by state and local governments. The holding has been properly characterized as a defense against government's efforts not only to discourage potential signature gatherers from participating in the petition process, but also diminishing the possibility that petitions would garner sufficient voter signatures to reach the ballot. *Buckley v. American Constitutional Law Foundation,*

status and constitutional protections of initiative-petition circulators seeking voter signatures to place an initiative on the ballot, and citing *Meyer v. Grant*, supra, again confirming that the circulation of a proposed ballot initiative is "core speech" and that "[w]hen an initiative petition circulator approaches a person and asks that person to sign the petition, the circulator is engaging in "interactive communication concerning political change.""

Action That Constrains Core Political Speech Is Subject To Exacting Scrutiny

In *Buckley*, supra, at 191, this court restated the settled rule that in those cases in which government action clearly and directly restricts "core political speech," as opposed to the "'mechanics of the electoral process,'" the restrictions will be viewed as restrictions on core political speech that plainly impose a "severe burden." This court then reiterated the requirement that hindrances to political speech affecting the circulation of voter petitions be reviewed under the "exacting scrutiny" standard of *Meyer v. Grant*, supra, 486 U.S. 414, 419 (1988).

Applying that standard the City of San Diego and its joint business venture partner, the Padres, must demonstrate that the state's interests in permitting proponent/circulators of voter initiatives to be named as defendants *in actions filed during the circulation period of the petition* are substantial, are furthered by the filing of such actions, *and* outweigh the First Amendment burden such

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Inc.: Emblem Of The Struggle Between Citizens' First Amendment Rights And States' Regulatory Interests In Elections Issues, 78 N. CAR. LAW REV. 477.

litigation imposes of the Petitioners' core political speech in that there exist no reasonable alternatives permitting them to address legitimate concerns in a timely manner.

Action That Constrains Core Political Speech Must Be Narrowly Drawn

Since the filing of legal actions against proponent/circulators imposes a severe burden on political speech and association, this government activity must therefore be narrowly tailored to advance a compelling state interest in order to pass constitutional muster. See *California Democratic Party v. Jones* 530 U.S. 567, 582 (2000); *Buckley v. American Constitutional Law Foundation*, supra, 525 U.S. 182, 192, n.12 (1999); *Eu v. San Francisco County Democratic Central Comm.* 489 U.S. 214, 225 (1989). Therefore, when the operation of state laws subject speech, association, or the right to vote to severe restrictions, the operation of the law must be "narrowly drawn to advance a state interest of compelling importance." *Burdick v. Takushi* 504 U.S. 428, at 434 (1992).

The Chilling Effect On Proponent/Circulators

The guarantee of freedom of speech necessarily prohibits not only government action directly restricting speech, but also action that has a "chilling effect" on legitimate speech.

Petitioners do not seek in this case to free proponent/circulators of a voter initiative from the treat of all litigation, rather merely from the threat of litigation *prior to submission of their petition to their government.*

In fact, Petitioners in their initiative even provided for the right to be named as defendants in any action challenging the validity of the initiative *once enacted.* Section 8 of the Initiative[14] reads as follows:

> Section 8. STATUS OF PROPONENTS The proponents of this initiative shall be included among any defendants in any judicial challenge to any provision of this proposition.

Defending an initiative following enactment, however, when government itself is compelled by the adoption of the initiative by its voters to provide for the defense of its validity, is a very different matter from being named in lawsuits filed *during the circulation period* seeking injunctive relief to restrain submission to government along with challenging validity.

Lawsuits at the point in time in which voters are being contacted and initiatives actively circulated, particularly where those lawsuits are filed by government itself, have a dramatic affect on the ability of the proponent/circulators to continue circulation of the petition. The practical consequence is that the proposed petition is never presented to government by those who circulate and sign it – the precise result government and its business partner both sought in this case as is clearly evidenced by their respective prayers in their complaints.[15]

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[14] Appendix, p. A-48.

[15] City of San Diego's complaint: "For an injunction permanently restraining Defendants from filing the Proposed Initiative with the CITY for the purpose of

California's Treatment Of Voter Initiatives As Second Class Legislation

In California voter initiatives are judicially reviewed as "proposed" rather than "enacted" legislation. The distinction has a substantive impact as reflected in the different standards of review utilized by the California courts.

In the decision of the court of appeal, no special standard of review of the language of Petitioners' *proposed* initiative was articulated or applied. Yet, generally in California, when *enacted* legislation is reviewed by the courts, a standard of review is applied that prefers validity.

California's rules of construction for *adopted* legislation provide, for example, that all presumptions and intendments favor the validity of the statute and mere doubt does not afford sufficient reason for judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears." *Lockheed Aircraft Corp. v. Superior Court* 28 Cal.2d 481, 484 (1946). It is also the general rule that the existence of facts supporting a legislative enactment is to be presumed. *Dribin v. Superior Court* 37 Cal.2d 345, 352 [24 A.L.R.2d 864] (1951). Courts are to give force and effect to a questioned statute unless it appears

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qualifying the measure for a public vote pursuant to San Diego Municipal Code, Division 25... ." Appendix p. A-40. Padres' complaint: "For an injunction enjoining Defendants from placing the proposed initiative on the ballot... ." Appendix pp. A-57.

clearly unconstitutional. *Denny v. Watson* 114 Cal.App.2d 491, 495 (1952).

The California rules of construction are reflected in federal cases. For example, in *Broadrick v. Oklahoma* 413 U.S. 601, 613 (1973), the court noted that facial invalidation of an ordinance is a remedy granted "sparingly and only as a last resort."

However, as common as these rules of construction are, the rules were neither cited nor applied by the court of appeal in reviewing Petitioners' proposed initiative.[16]

It followed, not surprisingly, that absent the application of the usual presumptions supporting validity of legislation, the court of appeal concluded that the voter initiative proposed by Petitioners constituted a prohibited "administrative" enactment.

A second indicator that pre-adoption judicial review of voter initiatives in California relegates them to the status of second-class legislation is the failure of the trial court or the court of appeal to apply another general rule governing the interpretation of legislative acts. That rule is

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[16] Petitioners have not raised the issue of whether the reservation of the right of initiative can be limited to "legislative" enactments as distinguished by California courts from "administrative" legislation; although, this distinction appears to itself pose due process questions since all legislative bodies in California other than the voters are empowered to enact either classification of legislation. The purported distinction is discussed in detail by the court of appeal (Appendix, pp. A-23 et seq.)

that legislative enactments (apparently excepting voter initiatives) may not be challenged *until implementation becomes imminent*. See, for example, *City of Los Angeles v. Superior Court* 51 Cal.2d 423, 430 (1959): an injunction cannot be granted to "prevent a legislative act by a municipal corporation." In fact, this general rule in California is in accord with settled case law of this court. See, *McChord v. Cincinnati, N. O. & T. P. RY. CO.* 183 U.S. 483, 495 (1901): "the general rule is that legislative action cannot be interfered with by injunction." See, also, *Younger v. Harris* 401 U.S. 37 (1971).

In California's recent past, the same rule was applied to voter initiatives. In starting down this slippery path, the California Supreme Court noted in *American Federation of Labor v. Eu* 36 Cal.3d 687, at 695 (1984), that it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures *after* an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity.

Currently, however, the exception has become the rule. So here, foregoing traditional alternatives that do not chill the exercise of First Amendment rights, government is permitted to escalate its war on voter initiative petitions by suing proponent/circulators during the signature gathering phase of the initiative process. That result naturally follows from the fact that pre-submission review of voter initiatives is now the favored remedy in California. The court of appeal states in this regard:[17]

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[17] Appendix, p. A-15.

> First, however, we reiterate the well-established nature of the rule that it is proper to conduct pre-election review of a claim that a proposed measure may not properly be submitted to the voters because, for example, the measure is not appropriately legislative in character. ... . In light of this rule, and because only legal questions are presented on an undisputed set of facts giving rise to the summary judgment motions, we may properly proceed to examine the procedural and substantive issues raised with respect to the validity of the proposed initiative. There is no threat to the proponents' constitutional rights under the First Amendment or the California Constitution in this process, because where there is a legitimate question raised about the power of the voters to adopt a proposed initiative, the Supreme Court has stated there is no value "in putting before the people a measure which they have no power to enact."

In short, the rational articulated by the California courts for permitting pre-submission review of voter initiative petitions *admits* that the goal is to discourage the circulation of petitions among voters which are judicially determined to be flawed. The result is apparent – pre-submission review during the circulation period for a voter initiative both chills contact and effectively censors content.

Various pernicious consequences flow from premature review. So, the problem for Petitioners isn't just the dramatic impact on their petitioning efforts which

follow from the filing of lawsuits during the circulation period, the problem is also that litigation challenging legislation proposed by voters such as Petitioners is subjected to rules far less advantageous to proponents of validity when that review occurs prior to enactment. *Both* factors contribute to the same practical result: the immediate death of the circulation process and the practical inability of the proponent/circulators to place their petition before voters for their signatures, let alone their vote.

Lastly, in judging the impact of the litigation complained of by Petitioners, the court should consider Petitioners' status as voters and taxpayers, that is, their status as individuals seeking to promote by way of their proposed initiative the rights of the public as a whole, rather than their individual financial interests.

Under such circumstances, the commitment of Petitioners' time and resources is fully engaged in pursuing the circulation of their initiative. The pre-submission lawsuits divert precious time and resources away from that effort during the most critical of all periods in the voter initiative process. As such, the *extraordinary burden* the lawsuits place on Petitioners is entirely out of proportion to the *slight burden* placed on the instigators of the lawsuits, particularly given the business interests of the two plaintiffs in this matter.

In other words, for the City of San Diego and for its business partner, the Padres, it can be reasonably said that the public benefit, if any, of litigation *during the circulation period* for the initiative was miniscule in comparison to the private, financial advantage potentially gained by them.

Under Existing California Law Reasonable Alternatives Exist To Address Legitimate Concerns Regarding A Voter Initiative In A Timely Manner

Naturally, the mere submission of a voter initiative to government does not constitute enactment. That is, subsequent to submission, signatures are counted to determine if a sufficient number of voters have qualified the initiative for the ballot. Then the initiative must be set for a vote. Obviously, therefore, there is considerable time prior to the public vote and even subsequent to adoption (of course, rejection by the voters moots it) for aggrieved parties to challenge the initiative's validity as a legislative enactment.

It is also important to note, that when filing a challenge to the validity of an initiative, the usual practice in California has been the name as defendants, not the proponent/circulators of the initiative, but to name as defendants the government entity which would ultimately be responsible for placing the proposal on the ballot or implementing the proposal if enacted. See, *Hotel Employees & Restaurant Employees Internat. Union v. Davis* 21 Cal.4th 585 (1999).

In this regard, it is significant that any argument that legal challenges are justified by purported harm suffered prior in time to the submission of a voter initiative to the government entity to which the initiative is directed is harm that obviously flows, not from the *enactment* of the proposed legislation, but flows from the *circulation* of the initiative. That purported harm flows, therefore, from the very exercise of the right of petition that Petitioners seek to defend. As such, the purported harm may not be treated

as a justification for interfering with the Petitioners' rights, separate and apart from the court's analysis of scope and impact of those rights on the petitioning process.[18]

The General Rule In California Is That Government May Not Sue Its Citizens In Connection With The Exercise Of Their Rights To Petition Government

As previously noted, the common procedure in the past in California in challenging voter initiatives was to name government as the defendant. Now, essentially, for the first time initiative proponent/circulators become a target judicially sanctioned as such.

Petitioners argued to the trial court and the court of appeal that naming proponent/circulators during the circulation period violates the rule articulated in *City of Long Beach v. Bozek*, supra, 31 Cal. 3d 527. The California Supreme Court acknowledges in *Bozek* that under constraints imposed by both the federal and state constitutions government may not, by filing a lawsuit against its own citizens, chill those citizens' right to petition their government. At page 536, the California Supreme Court stated the rule that should have governed Petitioners' case:

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[18] Consider in this regard the Noerr-Pennington Doctrine arising from *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.* 365 U.S. 127 (1961) and *United Mine Works of America v. Pennington* 381 U.S. 657 (1965), whereby this court has created privileges from civil liability for actions constituting the exercise of the right of petition.

> The right of petition, like the right of free speech, is "of the essence of [a person's] guaranteed personal liberty." [citation] Like the right of free speech, it should be scrupulously protected. We thus accord substantial weight to the need to protect the right of petition as a factor counterbalancing the tort policies which favor recognition of the city's cause of action.

The applicability of the reasoning of this case to Petitioners is obvious. Not only are they exercising their rights of petitioning government, not only will litigation instigated by government against them chill the exercise of their rights to petition, but, just as importantly, a reasonable and timely alternative remedy is available to government to address its legitimate concerns.

Active participants in society understand that litigation is a possibility. Yet, numerous procedural rules exist that limit the timing and nature of access to the courts. Here, while it may well be that government should never be permitted to sue petition proponents to challenge their petition or its circulation (absent criminal activity) and while government's business partner may well be subject to a like constraint, there is no question that a time and place naturally arises following the submission of the petition at which point in time citizens, but not government, may challenge its validity.

Petition circulation, after all, accomplishes a number of goals valuable to a free society. The process educates the public. The number of signatures gathered provides evidence of the concern for the issue among the voters generally. Submission of signatures in numbers sufficient to qualify the matter for the ballot engenders public

debate. Passage or defeat, whether or not the legislation is ultimately held valid or invalid, again serves as a significant indicator of the public interest.

In all of these processes, government is driven by an inherent conflict of interest. Government would naturally desire to nip political opposition in the bud. That is, initiatives aren't generally circulated because government has or currently is responding to an issue in harmony with the circulators views. To the contrary, government often would like to avoid public debate where the proposed action is viewed by government deems as contrary to its vested interests.

This inherent conflict is, of course, the very reason for the addition of the First and Fourteenth Amendments to our Constitution.

The Padres Status As A Joint Venture Business Partner Of The City Of San Diego Results In Its Lawsuit Constituting Government Action

A number of cases clearly hold that the right of petition encompasses the right of an individual to petition the government for redress of grievances against another private person, as well as the right to petition for redress of grievances against the government itself. (See, e.g., *California Transport v. Trucking Unlimited* 404 U.S. 508, 510 (1972).

Nevertheless, when private individuals act *jointly* with state officials in performing a prohibited act, the conduct is deemed to meet the color of law requirement [*Lugar v. Edmondson Oil Co.* 457 U.S. 922, 941-942 (1982) (invoking state-created judicial attachment procedures that

required only ex parte application was sufficient joint participation with state officials to meet color of law requirement); *Burton v. Wilmington Parking Authority* 365 U.S. 715, 723-725 (1961), (state's leasing of public property to private party in building dedicated to public use made state joint participant and rendered discriminatory acts by private party a state action under U.S. Const., amend. XIV); *Sable Com. of California v. Pacific Tel. & Tel.* 890 F.2d 184, 188-189 (9th Cir. 1989) (telephone company's repeated requests to law enforcement agents to take action to trigger procedure that would violate customer's First Amendment rights was joint participation with state)].

In this case the right of the Padres to "petition" government is, of course, pitted against the Petitioners' petition rights. Resolving this conflict is, however, readily achieved by applying the very rules discussed above, namely, the rights of the Padres to petition government for redress must give way to the rights of the Petitioners to petition government where (1) the exercise by the Padres of their rights chill the exercise of Petitioners' rights and (2) a reasonable alternative exists for the Padres to resolve their legitimate concerns in a timely fashion.

CONCLUSION

The *assault* on voter initiatives decried by the editors of THE WALL STREET JOURNAL[19] has recently been well-documented by Joseph Zimmerman, [20] who concludes at

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[19] See page 3 above.

pp. 179-180 of his exhaustive review of the history and issues surrounding the use of the voter initiative as follows:

> This review and analysis of initiated law-making by voters reveal that the process has not always lived up to the highest democratic ideals, yet a need remains for this political corrective in the state and local governments where it is authorized. Furthermore, the many important political reforms instituted through the initiative process support the recommendation that the device should be available to the electorate in all state and local governments.

Permitting government and/or its private joint venture business partner to sue proponent/circulators of a voter initiative *during the circulation period* imposes a significant burden on the right of political speech protected by the First Amendment.

While government's interest in determining the legal validity of any law is obvious, permitting lawsuits to be filed against proponent/circulators during the circulation period for a voter initiative does not outweigh the First Amendment burden such pre-submission lawsuits impose on political speech, given the obvious and heretofore commonly utilized alternatives to determining validity prior to implementation.

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[20] Joseph F. Zimmerman, THE INITIATIVE CITIZEN LAW-MAKING, Praeger, 1999, pp. 209. Joseph F. Zimmerman is Professor of Political Science at the State University of New York in Albany.

In permitting this premature litigation, the decision of the state court directly contradicts settled rules of constitutional law established by this court. It follows, therefore, that the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/_____

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APPENDICES

Appendix A - Decision Of The California Supreme Court

Filed April 25, 2001 Court of Appeal, Fourth Appellate District, Division One – Nos. D035559/D035585

S095767

IN THE SUPREME COURT OF CALIFORNIA

En Banc

CITY OF SAN DIEGO, Plaintiff and Respondent,

v.

MICHAEL KANE DUNKL et al., Defendants and Appellants.
And companion case

Petition for review DENIED.

Kennard, J., is of the opinion the petition should be granted.

/s/ George, Chief Justice

Appendix B - Decision Of The California Court Of Appeal

86 Cal. App. 4th 384

Filed 1/22/01 CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CITY OF SAN DIEGO, Plaintiff and Respondent, v. MICHAEL KANE DUNKL et al., Defendants and Appellants. D035559 (Super. Ct. No. GIC 741206)

PADRES L.P., Plaintiff and Respondent, v. MICHAEL KANE DUNKL et al., Defendants and Appellants. D035585 (Super. Ct. No. GIC 741207)

APPEALS from judgments of the Superior Court of San Diego County, Judith D. McConnell, Judge.

Affirmed.

J. Bruce Henderson and Kent C. Wilson on behalf of defendants and appellants.

Luce, Forward, Hamilton & Scripps, Charles A. Bird; Casey G. Gwinn, City Attorney and Leslie J. Girard, Assistant City Attorney on behalf of plaintiff and respondent City of San Diego.

Gray, Cary, Ware & Freidenrich, Mark C. Zebrowski, Kathryn E. Karcher and Mary A. Lehman on behalf of plaintiff and respondent Padres, L.P.

These two separate declaratory relief actions were brought by the City of San Diego (the City) and the limited partnership which owns the San Diego Padres professional baseball team, Padres, L.P. (the Padres) against two individuals, Michael Dunkl and Philip Zoebisch (collectively referred to as the proponents), who began in November 1999 to circulate a proposed initiative which would have made certain negative findings concerning an earlier city ordinance, Proposition C (Prop. C). Prop. C was adopted by City voters in November 1998 to enable funding and construction of the downtown ballpark redevelopment project pursuant to a Memorandum of Understanding (MOU) between the City, its redevelopment agency, the Padres and others.

The City and the Padres sought judicial declarations that the proposed initiative, commonly known as the Ballpark Initiative (referred to here as the proposed initiative), was invalid and should not be placed on the ballot even if adequate signatures for that purpose were obtained. These actions were coordinated in the Superior Court and resulted in summary judgments in favor of the City and the Padres, the moving parties below. The basis of the summary judgment rulings was that the proposed initiative was invalid and should not be placed on the ballot for an upcoming election, because it sought to enact measures that were beyond the power of the voters to adopt. Specifically, the findings that the proposed initiative sought to enact were not legislative in character but rather were administrative measures properly within the domain of the City administration.

The proponents of the proposed initiative appeal the summary judgments and also the related rulings of the

Superior Court that found their related motions to strike the complaints under Code of Civil Procedure section 425.16, the SLAPP motions,[21] must be taken off calendar as moot in view of the City's and the Padres' successful summary judgment motions. These two appeals have been consolidated in this court for oral argument and decision. The proponents argue that the trial court erred as a matter of law in characterizing the proposed initiative as failing to meet the criteria for a permissible ballot measure that was legislative in character. The proponents also argue that the rulings that the SLAPP motions were moot were erroneous and represent an impermissible chilling of their constitutional rights to petition the government for redress of grievances.

On de novo review of the summary judgments, we find that pre-election review of the proposed initiative was appropriately carried out and that the superior court reached the correct legal conclusions in granting summary judgment to the City and the Padres on their requests for declaratory relief that the proposed initiative was invalid. We further conclude that the trial court correctly determined that the SLAPP motions to strike were moot once the Padres and the City prevailed on the legal questions presented for resolution in the summary judgment proceedings. It is well accepted that pre-election

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[21] All statutory references are to this code unless otherwise stated. The acronym SLAPP has been widely adopted to describe lawsuits affecting speech or petition rights (Strategic Lawsuit Against Public Participation). (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1.)

review of ballot measures is appropriate where the validity of a proposal is in serious question, and where the matter can be resolved as a matter of law before unnecessary expenditures of time and effort have been placed into a futile election campaign. (Senate of the State of Cal. v. Jones (1999) 21 Cal.4th 1142, 1153.) There is no constitutional right to place an invalid initiative on the ballot. (See, San Francisco Forty-Niners v. Nishioka (1999) 75 Cal.App.4th 637, 645-648.) That was the case here, and no inappropriate restriction of the proponents' constitutional rights occurred under these circumstances. We affirm the summary judgments and underlying rulings for the reasons explained below.

FACTUAL AND PROCEDURAL BACKGROUND

In November 1998, the City's voters approved Prop. C by approximately a 60-40 percentage margin, authorizing the City to enter into an MOU with, in particular, the Padres.[22] Prop. C and the MOU it authorizes provide for a public-private partnership between the Padres, the City and redevelopment entities to build a new major league ballpark as part of a larger redevelopment project in Centre City East in downtown San Diego (sometimes called the project). Prop. C states that its purpose and that of the MOU it authorized are to

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[22] In full, the title of the MOU is "Memorandum Of Understanding Between The City Of San Diego, The Redevelopment Agency Of The City Of San Diego, The Centre City Development Corporation, And Padres L.P. Concerning A Ballpark District, Construction Of A Baseball Park, And A Redevelopment Project," as set forth in Prop. C.

constitute legislative acts establishing policy for the City on these matters, and further to provide the ways and means to implement such policy by any necessary and appropriate administrative and nonlegislative acts that will carry out the purpose and intent of the ordinance. Prop. C also authorizes the city council to amend or modify the MOU, in the best interests of the city entities, "only if any such amendment or modifications do not materially: 1) decrease the rights or increase the obligations of the City; 2) increase the financial commitments of the City; or 3) decrease revenue to the City." The City may carry out the MOU and associated agreements if they are in the best interests of the City, with respect to the same three criteria.

Under the MOU, the redevelopment project will proceed as long as the City finds several conditions subsequent have been met. On March 31, 1999, the city council issued written findings based on testimony and other evidence that several of the conditions subsequent specifically set forth in the MOU had been satisfied. These findings recited that the City had determined it would be feasible to complete land acquisition, environmental approvals, parking facilities and infrastructure, and the Padres had made the necessary assurances regarding the private development that would be completed in association with the redevelopment and ballpark project, including a 1,000-room hotel project. However, other MOU conditions still remained to be satisfied at the times covered by this record, including the crucial requirement that the City be assured it and its redevelopment agency will be able to obtain financing for the City's $225 million investment in the ballpark on reasonably acceptable terms and on a fully tax-exempt basis.

In November 1999, the proponents published and filed with the city clerk their notice of intent to circulate the proposed initiative. After the required 20-day waiting period, the proponents began to gather voter signatures.[23] The proposed initiative as circulated has the stated purpose of determining on behalf of the City, through its voters, that as of November 2, 1999, "certain contingencies and conditions subsequent affecting obligations of the City set forth in various provisions of the MOU have failed, are unsatisfied, or are defeated by nonperformance." (Proposed initiative, § 2, subd. (a); all further references to the proposed initiative are to section and subdivision in abbreviated fashion.) The proposed initiative further states that it shall have the effect of terminating as of November 2, 1999 any contingent obligations of the City, pursuant to the related determination that the conditions subsequent have failed. (Ibid., § 2, subd. (b).) The proposed initiative would further have provided "that reinstatement or creation of similar obligations of the City which are terminated by this proposition shall require a two-thirds vote of the people in an election held for that purpose." (Ibid., § 2, subd. (c).)

Other key sections of the proposed initiative are section 3, the Findings and Declarations section, and section 4, entitled "Exercise of City's Discretion." Section 3, subdivisions (a) and (b) express disapproval of the expenditures anticipated by the MOU and of the hotel proposal as too risky. Section 3, subdivision (c) states the

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[23] The period for gathering signatures would have terminated on May 22, 2000, had it not been for the events of these court cases, filed January 4, 2000.

intent of the voters to establish, through the proposed initiative, policy for the City and its implementation "by such administrative and non-legislative acts as may be necessary and appropriate to carry out the purpose and intent of Proposition C and the MOU." Under section 3, subdivision (d), the voters shall directly exercise the discretion of the City to implement the MOU in the best interests of the City.

Section 4 of the proposed initiative then sets forth a list of the specific conditions subsequent and contingencies that the initiative would have deemed unsatisfied or failed if not completed or waived by city council action on or before November 2, 1999, thus having the effect of terminating all obligations of the City under the MOU. These allegedly unsatisfied conditions include the City's ability to obtain financing on reasonably acceptable terms, the temporary extension of the Padres' use and occupancy at Qualcomm Stadium, the profitability of the project for purposes of generating taxes, and the obtaining of adequate financing and security for the investments. Section 4, subdivision (e) states that the adoption of the proposed initiative would establish, retroactive to November 2, 1999, such policy and implementation that would carry out the purposes and intent of the proposed initiative and the MOU.

The proposed initiative includes a severability clause, and also states that the proponents of the initiative (the individuals Dunkl and Zoebisch) shall be included among any defendants in any judicial challenge to any provision of the proposed initiative.

On January 4, 2000, about six weeks after the signature-gathering period commenced, the City and the

Padres filed these declaratory relief actions, challenging the validity of the proposed initiative and also seeking injunctive relief against its continued circulation. The superior court coordinated the actions. The proponents immediately noticed special motions to strike the complaints as SLAPP suits under section 425.16 et seq.[24] They contended that their constitutionally protected activities of petitioning the government and free speech were being jeopardized by the existence of the actions.

The City and the Padres promptly sought an order shortening time to place their summary judgment motions on calendar as companion matters. (§ 437c.) They contended that the existence of the proposed initiative was

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[24] Section 425.16 provides in relevant part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ." (*Id.*, subd. (e).)

jeopardizing funding for the ballpark project, and hence pre-qualification review of the proposed initiative was appropriate. The trial court set the summary judgment hearing for February 28, 2000. It set the SLAPP motions for hearing on February 14, 2000, but took them under submission and ruled on all the motions at once. In its summary judgment reply papers, the City retreated from its request for an injunction, on the basis that the proponents had conceded the initiative was "dead" if found invalid by the court. The proponents evidently had no apparent intent to present a void initiative to the city clerk for certification to be placed on the ballot. The Padres also did not further pursue injunctive relief.

At the hearings on the motions, the proponents argued their motions to strike should be granted because of a potential chilling effect on the initiative process if individual proponents could be sued. They argued the city clerk would be a more appropriate defendant. They also argued that the City and the Padres were guilty of unreasonable delay or laches because they did not sue until after the end of the 20-day waiting period after the publication and filing of the notice of intent to circulate the petition. (San Diego Muni. Code (SDMC), § 27.1007, Time to Begin Circulating Initiative Petition.) The City and the Padres responded that they had acted promptly and the 20-day waiting period was meant only to ensure that the City could enact the same matter as in the proposed initiative if it desired, but there was no such desire here. They denied that any unconstitutional restraint of speech was going on, rather, the pursuit of the actions was justified due to the highly regulated nature of election activity. The Padres further argued that the content of the proposed initiative would amount to unconstitutional

impairment of its contract rights, and also claimed voter fraud by the misleading nature of the proposed initiative.

In ruling on the motions, the Superior Court declined to address the argument that the proposed initiative was illegal due to misrepresentation of its purpose or the issue of any illegal impairment of contract. The court's ruling first stated that pre-election review of ballot measures, while rarely undertaken, is appropriate where the validity of the proposed measure is in serious controversy. The court focused its analysis upon section 2 of the proposed initiative, which stated its purpose to be a finding that certain contingencies and conditions subsequent affecting the obligations of the City as set forth in the MOU had failed, were unsatisfied, or were defeated by nonperformance. The court stated that the factual findings contained in the proposed initiative, which purported to carry out the purpose and intent of Prop. C and the MOU and to exercise the City's discretion as allowed by the MOU, would actually be findings such as those that are typically made by a governing entity in an administrative decision. The court found such fact-finding in an initiative to be impermissible, and ruled that the proposed initiative made only administrative decisions that would have undermined a measure previously adopted by the voters. The court then stated that in light of its rulings, the SLAPP motions were moot.

Summary judgments were entered in favor of the City and the Padres. These timely appeals followed and have been consolidated by stipulation for oral argument and decision in this court. (§§ 904.1, subd. (a)(1), 425.16, subd. (j).) Immediately after filing their notices of appeal, the proponents brought writ petitions in this court to

challenge the denial of or refusal to rule on the SLAPP motions. The petitions were summarily denied.

DISCUSSION

I

Issues Presented

Both the summary judgments and the underlying SLAPP rulings are on review in this matter. The City and the Padres regard the summary judgments as dispositive, while the proponents of the proposed initiative contend that the SLAPP issues are the real key to this case and should not have been ruled to be moot due to the summary judgments' issuance. All the issues are closely interrelated. Under the procedural mechanism set out by the SLAPP statute, section 425.16, subdivision (b)(1), the court may strike a cause of action against a person that fits within the SLAPP parameters (as arising from any act of that person in furtherance of the person's constitutional right of petition or free speech in connection with a public issue) "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Where, as here, the plaintiffs' declaratory relief actions present purely legal questions about the validity of the subject matter of the lawsuits, by way of a challenge to a proposed ballot measure, the SLAPP issue of whether the plaintiffs are more probably than not going to prevail in their actions may appropriately be determined by the use of related summary judgment proceedings. (§§ 425.16, subd. (b)(1), 437c.) The question here is not whether the defendant proponents are likely to prevail in their defense

of the measure. Under the SLAPP statute, the question is whether the plaintiffs who are challenging the ballot measure are *likely* to prevail at *trial* or at *pretrial* motion proceedings.

Accordingly, within the SLAPP framework, the trial court did not err in addressing the summary judgment issues first to determine whether the plaintiffs City and the Padres were likely to prevail in their challenge. (§ 425.16, subd. (b)(1).) However, here, as in the trial court, due to the intertwined nature of the pending motions, it is necessary to consider the procedural questions raised in connection with both the SLAPP and summary judgment motions simultaneously, before drawing any final conclusions. We do so below.

First, however, we reiterate the well-established nature of the rule that it is proper to conduct pre-election review of a claim that a proposed measure may not properly be submitted to the voters because, for example, the measure is not appropriately legislative in character. (Senate of the State of Cal. v. Jones, supra, 21 Cal.4th 1142, 1153, citing American Federation of Labor v. Eu (1984) 36 Cal.3d 687, 695-697, which granted pre-election relief when an initiative measure violated a federal constitutional provision and also exceeded the scope of the initiative power.)

In light of this rule, and because only legal questions are presented on an undisputed set of facts giving rise to the summary judgment motions, we may properly proceed to examine the procedural and substantive issues raised with respect to the validity of the proposed initiative. There is no threat to the proponents' constitutional rights under the First Amendment or the

California Constitution in this process, because where there is a legitimate question raised about the power of the voters to adopt a proposed initiative, the Supreme Court has stated there is no value "in putting before the people a measure which they have no power to enact." (American Federation of Labor v. Eu, supra, 36 Cal.3d at p. 697.) Rather, "[t]he presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure." (Ibid.; see also Citizens for Responsible Behavior v. Superior Court (1991) 1 Cal.App.4th 1013, 1021-1024.) Accordingly, before the SLAPP issues can be finally determined, the facial validity of the proposed initiative must be resolved.

II

Summary Judgment and Related SLAPP Issues

"In evaluating the propriety of a grant of summary judgment our review is de novo, and we independently review the record before the trial court. [Citation.] In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment. [Citation.]" (Lenane v. Continental Maritime of San Diego, Inc. (1998) 61 Cal.App.4th 1073, 1079.) Section 437c, subdivision (c) provides that a motion for summary judgment shall be granted if all the papers submitted show there is no triable issue as to any material fact such that the moving party is entitled to judgment as a matter of law.

Where the trial court grants summary judgment solely upon the basis of its interpretation of statutory and case law, "[i]t is well settled that the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law [citation] which is subject to de novo review on appeal. [Citation.]" (Rudd v. California Casualty Gen. Ins. Co. (1990) 219 Cal.App.3d 948, 951-952.) In such a case, the appellate court is not bound by the trial court's interpretation. (Ibid.; California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 699.)

Our first task will be to focus upon the preliminary procedural issues raised by appellants in their challenges to both the summary judgments and the underlying SLAPP rulings. We shall then turn to the substantive arguments about the validity of the proposed initiative, and finally return to the SLAPP rulings.

A

Procedural Issues

In attacking both the summary judgments and the SLAPP rulings, the proponents argue they were not properly named defendants in the action, and the city clerk would have been a more appropriate and a more traditional defendant to have been named, based on other election challenge cases. (See, e.g., Senate of the State of Cal. v. Jones, supra, 21 Cal 4th 1142; San Francisco Forty-Niners v. Nishioka, supra, 75 Cal.App.4th 637.) The proponents base this argument both on traditional constitutional protections of the right to petition the government for redress, and on their reading of the SDMC. Neither of these arguments is well taken. First,

their citation to City of Long Beach v. Bozek (1982) 31 Cal.3d 527, 532 (Bozek) is inapposite. That case dealt with whether governmental entities may sue private citizens for malicious prosecution. In holding this is not permissible, the Supreme Court discussed the paramount importance of protecting the constitutionally guaranteed right to petition the government for the redress of legitimate grievances. (Ibid., citing U.S. Const., 1st Amend.; Cal. Const., art. I, § 3.) The court also noted there were other available remedies for governmental entities to regain costs and expenses expended in defending baseless claims. (Bozek, supra, 31 Cal.3d at p. 538.) Nothing in Bozek prevents a public or private entity from seeking in an otherwise authorized action a judicial declaration of the invalidity of a proposed ballot measure, even where private citizens are the proponents of same.

Nor is the proponents' citation to Smith v. Silvey (1983) 149 Cal.App.3d 400, 406-408 well taken. That case determined an injunction could not issue under section 527.6 where its effect was to prevent the person enjoined from contacting government agencies, and also interfered with his exercise of his rights to free speech and to petition for redress of grievances. This case is distinguishable because no injunctive relief was issued here and it was within the power of the court to consider the declaratory relief requests in ruling on these pre-election challenges of ballot measures. Election procedure is a highly regulated area and does not constitute pure expressive speech, which must be afforded a higher level of protection. (San Francisco Forty-Niners v. Nishioka, supra, 75 Cal.App.4th at pp. 647-648.)

The proponents also claim that the only known California case which directly granted relief against proponents of an initiative, City of Atascadero v. Daly (1982) 135 Cal.App.3d 466, 468, should be distinguished from this case because there was a stipulation of the parties in that case that a controversy existed, by which they submitted the validity of the ordinance to determination by the trial court. The issue there was whether a proposed ordinance could properly require the City to submit any revenue-raising measure to the voters for their approval before the measure could be implemented. (Id. at p. 469.) The court thus had to decide whether the initiative process should be available for the purpose of enacting the ordinance, and decided it was not. (Ibid.) The proponents here are incorrect that the trial court in that case derived its power to decide the controversy between the parties from their stipulation. Rather, subject matter jurisdiction was already present in view of the authority that allows pre-election challenges to determine the validity of the proposed initiative. Also, the proper parties were before the court to enable it to afford appropriate relief. (§ 389, subd. (a).)[25]

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[25] In another case involving an action against private proponents of a ballot measure, *Lincoln Property Co. No. 41, Inc. v. Law* (1975) 45 Cal.App.3d 230, the plaintiff taxpayer initiated the lawsuit seeking to enjoin the City and its officers from conducting an unlawful referendum election (first cause of action), and to restrain certain private individuals from circulating the referendum petition and making any misrepresentations concerning the effects of the proposed resolution (second cause of action). However, the plaintiff filed a request for dismissal of the

Accordingly, where the issue has been placed before the court of whether a proposal is lawful and may be placed on the ballot for the voters' consideration, the courts have the power and the duty to order that the measure is not qualified for the ballot if the measure is found to be beyond the power of the voters to enact. (American Federation of Labor v. Eu, supra, 36 Cal.3d at pp. 695-697; Citizens for Responsible Behavior v. Superior Court, supra, 1 Cal.App.4th at pp. 1021-1024.) There is no bar to naming the proponents as defendants where appropriate.

There are two additional reasons why these defendants were properly named parties in this action. First, section 8 of the proposed initiative states that these individuals shall be named as defendants in any judicial challenge to the measure, and that is what occurred. There is nothing in the proposed initiative to support the proponents' claim that this portion was only to go into effect if the proponents were successful in placing the measure on the ballot and in obtaining its approval from the voters. Rather, these defendants were properly named because they were the proponents of the measure and had the necessary interest in the subject matter to be named as parties, such that complete relief could be obtained by naming them as parties. (§ 389, subd. (a).)

Moreover, under the election procedure set forth in the SDMC, it would have been premature to name the city clerk as a defendant, because SDMC section 27.1021 only

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second cause of action against the individuals, and relief was only granted by the trial court against the City and its employees. (*Id.* at p. 233.) The judgment was affirmed.

requires the city clerk to accept a petition to place an initiative on the ballot if it is in substantial compliance with the requirements for the appropriate number of signatures and format. Here, the proposed initiative never got to that point, and the duties of the city clerk to process it further were never implicated, such that the city clerk would have been a necessary or appropriate party. (SDMC, § 27.1001 et seq.) Under SDMC section 27.1002 and 27.1020, the proponents' role is to prepare the petition and then submit it to the city clerk, once the required number of signatures has been obtained. The proponents are appropriate defendants under these circumstances.

Next, the proponents complain that the City and the Padres are not proper plaintiffs in these actions, because SDMC section 27.1025 permits challenges to ballot measures to be made by voters, and the City and the Padres are not voters. This objection is meritless because a voter challenge under SDMC section 27.1025 is not the sole avenue of relief for a party who seeks to demonstrate that a proposed ballot measure is beyond the powers of the voters to adopt. Rather, such a question of law may be raised by a nonvoter seeking declaratory relief under section 1060 as to the respective rights and duties of the parties and the construction of a written instrument, where the validity of a ballot measure is concerned. (See, e.g., Senate of the State of California v. Jones, supra, 21 Cal.4th at p. 1153.)

The proponents have raised two more procedural issues that warrant brief discussion before we address the merits. First, on appeal, they contend the City's and the Padres' actions should be held equitably barred for unreasonable delay, because the plaintiffs took no action to

challenge the proposed initiative during the three-week period after the proponents published and filed their notice of intention to present the proposed initiative to the voters. Rather, this action was brought about six weeks after the signature-gathering period began, which the proponents claim was too late. There is no valid basis for such a claim. The 20-day period after filing and publication, until signatures may be gathered, is evidently intended to give the City an opportunity to enact a similar measure, and does not constitute any deadline for bringing suit. (SDMC, § 27.1007.) This application for pre-election review of the validity of the ordinance was brought with reasonable promptness, and there is no basis to bar it on terms of undue delay. Of course, at the same time, the proponents are arguing that the action was prematurely brought, and should have been delayed until after the matter was placed on the ballot and voted upon. However, there is no basis for that claim either, in view of the well-accepted availability of pre-election review under these specific circumstances.

Further, it is meaningless for the proponents to point to the severability clause in the proposed initiative and to claim that the superior court should have tried harder to save any valid portions of the initiative. (§ 6; American Federation of Labor v. Eu, supra, 36 Cal.3d at p. 716, fn. 27.) The proponents have not pointed out how any such severability would be accomplished, nor could they, in view of the legal issues presented about the gist of the proposal, as we shall next discuss. (See Citizens for Responsible Behavior v. Superior Court, supra, 1 Cal.App.4th at p. 1035.)

In conclusion, none of the procedural arguments raised by the proponents amounts to any successful challenge to either the SLAPP or summary judgment rulings.

B

Substantive Arguments

The electorate has the power to initiate legislative acts, but not administrative ones: "While it has been generally said that the reserved power of initiative and referendum accorded by article IV, section 1, of the Constitution is to be liberally construed to uphold it whenever reasonable [citations], it is established beyond dispute that the power of referendum may be invoked only with respect to matters which are strictly legislative in character [citations]. Under an unbroken line of authorities, administrative or executive acts are not within the reach of the referendum process [citations]. The plausible rationale for this rule espoused in numerous cases is that to allow the referendum or initiative to be invoked to annul or delay the executive or administrative conduct would destroy the efficient administration of the business affairs of a city or municipality [citations]." (Lincoln Property Co. No. 41, Inc. v. Law, supra, 45 Cal.App.3d at pp. 233-234.)

To decide whether a particular ballot measure constitutes a legislative or an administrative act, we must apply the test well set out and explained in Valentine v. Town of Ross (1974) 39 Cal.App.3d 954, 957-958:

> "The acts, ordinances and resolutions of a municipal governing body may, of course, be

> legislative in nature or they may be of an administrative or executive character. (Hopping v. Council of City of Richmond, 170 Cal. 605, 610.) . . . [¶] Also well settled is the distinction between the exercise of local legislative power, and acts of an administrative nature. [¶] Following earlier authority, we said in Martin v. Smith, [1960], 184 Cal.App.2d 571, 575: """The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it."" [Citation]; we also said (184 Cal.App.2d at p. 575): 'Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as calling for the exercise of legislative power. Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence.' [Citations.]" (Emphasis added.)

Case law has established certain parameters for compliance with the standards for permissible legislative acts to be used in evaluating measures presented to or adopted by the voters. "It is clear that a measure may be kept off the ballot if it represents an effort to exercise a power which the electorate does not possess. [Citations.]" (Citizens for Responsible Behavior v. Superior Court,

supra, 1 Cal.App.4th at p. 1023.) Once a legislative policy has been established, the administrative acts that follow therefrom are not subject to referendum or initiative. (Andrews v. City of San Bernardino (1959) 175 Cal.App.2d 459, 463.) They should not obstruct the project, but should carry it out. (Ibid.) An enactment that interferes with the City's ability to carry out its day-to-day business is not a proper subject of voter power. (Lincoln Property Co. No. 41, Inc. v. Law, supra, 45 Cal.App.3d at pp. 233-234.) Similarly, an enactment that would impose a straitjacket on the City to make it impossible to carry out the public business should not be allowed. (Housing Authority v. Superior Court (1950) 35 Cal.2d 550, 559.)

To apply these tests here, we must construe on their face the terms of the three documents involved: Prop. C, the MOU, and the proposed initiative that follows them, to decide de novo what was the nature of the power sought to be exercised by the voters, in accord with the language of the proposed initiative as drafted by the proponents.

The proponents' basic position is that Prop. C impliedly provides for its own termination, because Prop. C authorized the city council to amend or modify the MOU, and to carry it out according to the best interests of the City, but only if such amendments or modifications do not materially decrease the City's rights, increase the City's obligations or financial commitments, or decrease City revenue. The MOU, as authorized by Prop. C also contains provisions allowing the City to find the required

contingencies have not been met, in which case the project would not proceed.[26]

The proponents thus contend that the proposed initiative must be considered to be legislative in nature, because it decides whether the project should proceed, not how it proceeds. They further argue that it is a fundamental policy decision for the City what type of financing should fund the construction, and thus it should be a legislative decision whether the City has made an appropriate decision in that respect. Because Prop. C and the MOU created financial obligations for the City, the proponents argue that it should be a legislative decision whether to repeal those obligations, as matters of serious public interest and concern. (See Wheelright v. County of Marin (1970) 2 Cal.3d 448, 458; Burdick v. San Diego (1938) 29 Cal.App.2d 565, 566.) Overall, they claim the proposed ordinance simply revises the public policy stated in Prop. C. For example, under the proposed initiative, a two-thirds vote of the electorate would be required to

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[26] The proponents contend, without authority, that the MOU authorized by Prop. C should be considered to be an ordinance itself. However, the plain language of both Prop. C and the MOU provide that pursuant to voter approval, Prop. C authorized the City entities to enter into the MOU, which constitutes an agreement or contract between the parties. The MOU is thus a separate document. We also note that the proponents' reliance on the MOU, section XLII, for the concept that the project might not ever proceed is not well taken. That section is not a termination section of the MOU, but rather deals with costs for negotiations and preparation of documents.

approve any revival of the project, should the proposed initiative pass and make official its findings that the required contingencies had not been met in a timely manner.

In order to evaluate these arguments, we examine the text of the relevant documents, Prop. C, the MOU, and the proposed initiative. In Prop. C, as approved by the voters, it is stated that the ordinance and the MOU it authorizes constitute the legislative acts establishing city policy on these matters, and also provide the ways and means for the implementation of the policy by such necessary and appropriate administrative and nonlegislative acts. Prop. C further authorizes the City to enter into amendments or modifications, or to carry out the necessary agreements as determined by the city council to be in the best interests of the City, subject to the criteria that the rights of the City shall not be decreased and its obligations not increased. The language of Prop. C gives the City the authority to determine its best interests by applying that criteria.

Under paragraph XXXIII of the MOU, there are a number of enumerated conditions subsequent, upon which the respective obligations of the parties, including the City, are contingent with respect to carrying out the purposes of the ordinance and the MOU. These include the City's and the redevelopment agency's ability to obtain reasonably acceptable and tax-exempt financing, and findings of feasibility of completing the necessary land acquisition, environmental approvals, and so forth. The City and its redevelopment agency are given the contractual power to waive these various conditions subsequent, and have done so with regard to some of the

timing requirements. The city council's findings made March 31, 1999 confirmed that the deadlines could be met and no parties were in default, or any default was waived.

Turning to the proposed initiative, its section 3, subdivision (c) declares that its policy shall be established and implemented to carry out the purpose and intent of Prop. C and the MOU. The manner in which it does so is by deeming the named contingencies and conditions subsequent of Prop. C to have failed or be defeated by nonperformance. Specifically, section 2, subdivision (a) of the proposed initiative would declare that the various contingencies and conditions subsequent affecting the City's obligations "have failed, are unsatisfied, or are defeated by non-performance." The proposed initiative in section 3, subdivision (d) and section 4, subdivision (a) declares that the voters' approval of the proposal shall act as a replacement for the exercise of the discretion of the City as provided in the MOU.

In some cases, it can be difficult to distinguish between legislative proposals that both declare a public purpose, but that also make "provisions for ways and means of its accomplishment" (Valentine v. Town of Ross, supra, 39 Cal.App.3d 954 at pp. 957-958), and their counterpart, "acts of administration" which are "those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body . . . ." (Ibid.) We are required to make such a distinction here.

Clearly, Prop. C declared certain legislative policy and directed that certain events take place to implement that policy, as ways and means of carrying out the policy. The proposed initiative does not seek to change this policy

by its plain language, but rather to change the substance of the implementing decisions that were created by Prop. C. In other words, the proposed initiative seeks to substitute the proponents' judgment regarding compliance with the applicable conditions and the feasibility of financing, in place of that process created by Prop. C and the MOU, which confided such implementing decisions to City administration. In so doing, the proposed initiative is an effort to administratively negate the legislative purpose of Prop. C. There is no overt statement that the Prop. C policy will be changed, but the manner in which the proposed initiative would replace City administrative discretion with voter approval places the proposed initiative firmly within the administrative category of voter enactments, which are not permitted. As such, the proposed initiative is beyond the power of the voters to adopt. Accordingly, the summary judgments were correctly granted as a matter of law on the undisputed facts shown by this record.[27]

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[27] Because we conclude the summary judgments were properly granted on the basis that the proposed initiative was beyond the power of the voters to adopt, we need not consider the Padres' alternative argument that the proposed initiative would have created an unconstitutional impairment of contract, or the claim that the proposed initiative was so misleading as to amount to a misrepresentation to the voters.

III

Conclusion

Because we have concluded the summary judgments were appropriately granted as a matter of law, the trial court was correct in determining there was nothing left for it to decide with regard to the pending SLAPP motions made by proponents, and in taking the motions off calendar as moot. Although under section 425.16, subdivision (b)(1), the court would have been authorized to strike a cause of action that fits within the SLAPP parameters, "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim," there was no longer any doubt that the plaintiffs City and the Padres were entitled to prevail on their declaratory relief causes of action. The proponents put the cart before the horse when they claim they should have been entitled to further litigate the declaratory relief matter, simply because they originally pursued their constitutional right to petition the government for redress by proposing the initiative. In this procedural context of evaluating ballot measures for validity, once a final determination has been reached regarding the subject matter of the action, a proponent's right to continue to defend the proposed ballot measure is also necessarily resolved as a question of law. It serves no legitimate purpose to permit a measure whose invalidity can be determined as a matter of law to remain on the ballot after such a ruling has been made. (See San Francisco Forty-Niners v. Nishioka, supra, 75 Cal.App.4th 637 at pp. 645-648.) Finally, there was no improper interference with the proponents' First Amendment rights in the manner in which this litigation was carried out and

resolved. (See Citizens for Responsible Behavior v. Superior Court, supra, 1 Cal.App.4th at pp. 1021-1022.)

DISPOSITION

The summary judgments and the underlying rulings are affirmed. Appellants to pay all costs on appeal.

CERTIFIED FOR PUBLICATION

Signed: /s/ HUFFMAN, J.

CONCUR:
KREMER, P. J.
McDONALD, J.

Appendix C - Final Tentative Ruling Of The Trial Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO
CENTRAL DIVISION
DATE: FEBRUARY 28, 2000
DEPT. 75

PRESENT HON. Judith McConnell, JUDGE
CLERK: J Peterson
BAILIFF: A. Alcantara
REPORTER A: Jeff Nunan

GIC741206
CITY OF SAN DIEGO, a California chartered city, Plaintiff
v.
MICHAEL KANE DUNKL, an individual;
PHILIP ZOEBISCH, an individual;
Defendants
coordinated with
GIC 741207
PADRES, L.P., Plaintiff,
v.
MICHAEL KANE DUNKL, an individual and PHILLIP ZOEBISCH, an individual
Defendants

TENTATIVE RULING:

THE UNOPPOSED REQUESTS FOR JUDICIAL NOTICE BY PLAINTIFFS PADRES L.P. AND THE CITY OF SAN DIEGO ARE GRANTED. THE REQUEST BY DEFENDANTS FOR JUDICIAL NOTICE OF ALL

CONTENTS IN THE COURT FILE IS GRANTED TO THE EXTENT THE COURT TAKES JUDICIAL NOTICE OF THE EXISTENCE OF SUCH DOCUMENTS BUT NOT OF THE TRUTH OF THE CONTENTS OF SUCH DOCUMENTS.

THE COURT CONSTRUES THE DECLARATION OF KENT C. WILSON FILED FEBRUARY 18, 2000, IN OPPOSITION TO THE MOTIONS FOR SUMMARY JUDGMENT AS A REQUEST FOR A CONTINUANCE PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 437c(h); THIS REQUEST IS DENIED. FURTHER DISCOVERY WITH RESPECT TO THE CONTRACTUAL ISSUES IS IRRELEVANT SINCE THE COURT, IN REACHING ITS DECISION, DOES NOT DEAL WITH THOSE ISSUES. THE REMMNING PROPOSED DISCOVERY REQUESTED WOULD NOT LEAD TO THE PRODUCTION OF CONTROVERTING EVIDENCE SINCE THE SOLE ISSUE RAISED BY THE MOTION FOR SUMMARY JUDGMENT IS A LEGAL ONE.

THE COURT DECLINES TO RULE ON SPECIFIC EVIDENTIARY OBJECTIONS. THE COURT DISREGARDS ALL EVIDENCE WHICH IS FOUND TO BE INCOMPETENT OR INADMISSIBLE. SEE BILJAC ASSOCIATES V. FIRST INTERSTATE BANK (1990) 218 CAL. APP. 3D 1410, 1419.

THE MOTIONS FOR SUMMARY JUDGMENT BY THE CITY OF SAN DIEGO AND PADRES ARE GRANTED PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 437c IN THAT THERE IS NO MATERIAL ISSUE OF FACT AND NO DEFENSE AS TO THE INVALIDITY OF THE INIATIVE PETITION BEING CIRCULATED BY DEFENDANTS.

PRELIMINARILY THE COURT NOTES THAT PRE-ELECTION REVIEW OF AN INITIATIVE IS RARELY UNDERTAKEN BY A COURT AND SHOULD BE DONE ONLY WHERE THERE ARE CLEAR AND COMPELLING REASONS TO DO SO. AS STATED BY OUR COURT OF APPEAL IN WILTSHIRE V. SUPERIOR COURT, 172 CAL APP 3D 296, AT 302,

> "THE INITIATIVE POWER IS "ONE OF THE MOST PRECIOUS RIGHTS OF OUR DEMOCRATIC PROCESS." COURTS HAVE REPEATEDLY STRESSED IT IS MORE IMPORTANT TO REVIEW CHALLENGES TO INITIATIVE MEASURES AFTER AN ELECTION RATHER THAN TO DISRUPT THE ELECTORAL PROCESS BY PREVENTING EXERCISE OF THE PEOPLE'S RIGHT TO VOTE. AN EXCEPTION TO THIS JUDICIAL RESTRAINT ARISES ON A SHOWING THE PROPOSED INITIATIVE IS BEYOND THE POWER OF THE VOTERS TO ADOPT OR IS NOT LEGISLATIVE IN CHARACTER." (CITATIONS OMITTED)

AS IN WILTSHIRE, SUCH A SHOWING HAS BEEN MADE. THE PROPOSED INITIATIVE FALLS WITHIN THE EXCEPTION AND PRE-ELECTION REVIEW IS PROPER.

FURTHERMORE, THE CALIFORNIA SUPREME COURT HAS OBSERVED THAT PRE-ELECTION REVIEW IS APPROPRIATE WHEN THE CHALLENGE TO AN INITIATIVE IS BASED UPON A CLAIM, AS HERE, THAT THE PROPOSED MEASURE MAY NOT BE PROPERLY SUBMITTED TO THE VOTERS BECAUSE THE MEASURE IS NOT LEGISLATIVE IN CHARACTER.

(AMERICAN FEDERATION OF LABOR V. EU (1984) 36 CAL 3D 687)

> "THE PRESENCE OF AN INVALID MEASURE ON THE BALLOT STEALS ATTENTION, TIME, AND MONEY FROM THE NUMEROUS VALID PROPOSITIONS ON THE SAME BALLOT. IT WILL CONFUSE SOME VOTERS AND FRUSTRATE OTHERS, AND AN ULTIMATE DECISION THAT THE MEASURE IS INVALID, COMING AFTER THE VOTERS HAVE VOTED IN FAVOR OF THE MEASURE, TENDS TO DENIGRATE THE LEGITIMATE USE OF THE INITIATIVE PROCEDURE." (AMERICAN FEDERATION OF LABOR V. EU, SUPRA, 36 AT PAGE 697.)

THE INITIATIVE THAT IS BEFORE THE COURT READS, IN PART, AS FOLLOWS:

> SECTION 2. PURPOSES OF THIS PROPOSITION
>
> (A) THIS PROPOSITION IS ENACTED TO DECLARE AND DETERMINE ON BEHALF OF THE CITY THAT AS OF NOVEMBER 2, 1999, CERTAIN CONTINGENCIES AND CONDITIONS SUBSEQUENT AFFECTING OBLIGATIONS OF THE CITY SET FORTH IN VARIOUS PROVISIONS OF THE MOU HAVE FAILED, ARE UNSATISFIED, OR ARE DEFEATED BY NON-PERFORMANCE.
>
> (B) THIS PROPOSITION IS ENACTED IN ORDER TO TERMINATE AS OF NOVEMBER 2, 1999, CONTINGENT OBLIGATIONS OF THE CITY SUBJECT TO CONJ'INGENCIES AND

CONDITIONS SUBSEQUENT THAT THIS PROPOSITION DECLARES AND DETERMINES HAVE FAILED, ARE UNSATISFIED, OR ARE DEFEATED BY NON-PERFORMANCE.

THE INITIATIVE GOES ON TO MAKE CERTAIN "FINDINGS AND DECLARATIONS" INCLUDING THAT IT IS THE PEOPLE'S INTENT "TO CARRY OUT THE PURPOSE AND INTENT OF PROPOSITION C AND THE MOU" AND TO "...EXERCISE THE DISCRETION OF THE CITY AS PROVIDED IN THE MOU..." THE FACTUAL FINDINGS CONTAINED IN THE PROPOSED INITIATIVE ARE THOSE TYPICALLY MADE BY A GOVERNING ENTITY IN AN ADMINISTRATIVE DECISION. SUCH FACT-FINDING IN AN INITIATIVE IS IMPERMISSIBLE.

THE PROPOSED INITIATIVE, IN SUM, MAKES ONLY ADMIMSTRATIVE DECISIONS TO UNDERMINE A PREVIOUSLY ADOPTED INITIATIVE. IF THE PROPONENTS WISH TO SPEAK OUT PUBLICLY, WRITE LETTERS, OR IN ANY OTHER WAY ATTEMPT TO INFLUENCE THE PUBLIC AND THE CITY COUNCIL TO TAKE THE ACTION PROPOSED HERE, THEY MAY DO SO, BUT THEY MAY NOT USE THE INITIATIVE PROCESS TO EXPRESS THEIR CONCERNS ABOUT ANY POSSIBLE FAILINGS OF THE BALLPARK PROJECT UNLESS THEY CLEARLY DO SO BY A LEGISLATIVE ACT.

IN LIGHT OF THE COURT'S RULING ON THE INVALIDITY OF THE INITIATIVE, THE COURT NEED NOT RULE ON THE PADRES' CONTENTION THAT THE INITIATIVE WOULD IMPAIR EXISTING CONTRACTUAL RIGHTS.

IN LIGHT OF THIS RULING, THE SLAPP MOTION IS MOOT. COUNSEL FOR PLAINTIFFS ARE TO PREPARE AND SUBMIT PROPOSED JUDGMENTS FOR THE COURT'S APPROVAL BY NO LATER THAN MARCH 13, 2000.

Appendix D - City's Complaint

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

CITY OF SAN DIEGO, a California chartered city, Plaintiff, v. MICHAEL KANE DUNKL, an individual; and PHILLIP ZOEBISCH, an individual, Defendants.

NO. GIC 741206 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff CITY OF SAN DIEGO alleges as follows:

JURISDICTION AND VENUE

1. Jurisdiction and venue are proper in this court because CITY OF SAN DIEGO ("CITY") has offices and does business within this judicial district; Defendants MICHAEL DUNKL and PHILLIP ZOEBISCH are located, do business, and/or reside in this judicial district.

PARTIES

2. CITY is a California chartered city pursuant to Article XI, section 3 of the California Constitution.

3. Defendants MICHAEL DUNKL and PHILLIP ZOEBISCH ("Defendants") are individual residents of CITY who are responsible for the circulation of the ballot initiative at issue (the "Proposed Initiative").

FIRST CAUSE OF ACTION

(Declaratory Relief)

4. CITY refers to paragraphs 1 through 3 of this Complaint and by reference incorporates those paragraphs as though fully set forth herein.

5. In November 1998, a majority of CITY's electorate voted in favor of Proposition C, which expressly authorized CITY to enter into agreements to redevelop an area of downtown San Diego, including the construction of a baseball park. A true and correct copy of Proposition C is attached hereto as Exhibit A.

6. Following the passage of Proposition C, in December 1998, CITY and Padres, L.P., a Delaware limited partnership ("Padres"), executed a contract entitled "Memorandum of Understanding" ("MOU") concerning the construction of the baseball park and a redevelopment project as a means of implementing the legislative policy established by Proposition C. Proposition C expressly authorized and directed CITY to enter into the MOU with Padres. A true and correct copy of the MOU is attached hereto as Exhibit B.

7. On or about November 1, 1999, Defendants filed with CITY a "Notice of Intent to Circulate Initiative Petition," referring to the Proposed Initiative. A true and correct copy of the Proposed Initiative is attached hereto as Exhibit C.

8. The Proposed Initiative purports to make various factual findings and to declare the failure of MOU conditions, thereby terminating the MOU. The findings

involve application of facts to an existing legislative policy, do not enact legislation, and are not the proper subject of the initiative power. Rather, the determination of MOU condition satisfaction is solely within the administrative province of the City Council of CITY. Therefore, CITY contends that the Proposed Initiative is illegal, invalid, and beyond the power of CITY's electorate to adopt.

9. CITY is informed and believes, and thereupon alleges, that Defendants contend the Proposed Initiative is legislative in nature, rather than administrative, and thus is a valid ballot measure in compliance with applicable law.

10. A declaratory judgment is both necessary and proper at this time to determine the validity of the Proposed Initiative. There exists a present, actual controversy.

SECOND CAUSE OF ACTION

(Injunctive Relief Against Defendants)

11. CITY refers to paragraphs 1 through 10 of this Complaint and by reference incorporates those paragraphs as though fully set forth herein.

12. If Defendants secure a sufficient number of signatures, they will file the Proposed Initiative with CITY. Unless restrained and enjoined from filing the Proposed Initiative with CITY for the purpose qualifying the measure for a public vote pursuant to San Diego Municipal Code, Division 25, sections 27.2501-27.2531, Defendants' actions would cause irreparable harm to all citizens of CITY in that CITY would incur unnecessary

expense and take unnecessary action in connection with the invalid Proposed Initiative.

13. Defendants will not be harmed and indeed will benefit if restrained from filing the Proposed Initiative with the CITY. The general public will likewise benefit from a restraining order and injunction because they will not be confused and misled by the Proposed Initiative and because the court's order will prevent waste of taxpayer funds. The Proposed Initiative, as an unlawful ballot measure, denigrates the legitimate use of the initiative process.

14. CITY has no plain, speedy, or adequate remedy at law other than the relief sought in this Complaint.

WHEREFORE, CITY prays judgment against Defendants, and each of them, as follows:

1. For a declaration that the Proposed Initiative is void because it purports to execute administrative acts rather than initiate legislation;

2. For an injunction permanently restraining Defendants from filing the Proposed Initiative with the CITY for the purpose of qualifying the measure for a public vote pursuant to San Diego Municipal Code, Division 25;

3. For costs; and

4. For all other and further relief the court may deem proper.

Signed: /s/ LUCE FORWARD HAMILTON & SCRIPPS LLP By: Charles A. Bird, Attorneys for Plaintiff, City of San Diego

[Exhibits A and B omitted]

Appendix D—Exhibit C To City's Complaint - Initiative Petition

INITIATIVE PETITION

To the Honorable City Council of The City of San Diego: We, the undersigned registered voters of The City of San Diego, California, by this petition hereby respectfully propose the following legislative act be adopted by the City Council or submitted to the registered voters of The City of San Diego for their adoption or rejection:

NOTICE OF INTENT TO CIRCULATE INITIATIVE PETITION

Notice is hereby given of the intention of the persons whose names appear hereon to circulate a petition within the City of San Diego for the purposes (1) of declaring that as of November 2, 1999, certain conditions and contingencies affecting obligations of the City of San Diego as set forth in Proposition C, voted on by the People of San Diego on November 3, 1998, are unsatisfied, unmet, and defeated by non-performance; (2) of terminating the respective obligations of the City of San Diego subject to those conditions and contingencies; and (3) of requiring that any reinstatement of those obligations or creation of similar obligations first obtain the affirmative consent of two-thirds of the voters of the City of San Diego voting at an election held for that purpose.

INITIATIVE PROPOSITION

Section 1. DEFINITIONS

(a) "Proposition C" shall mean the proposition so entitled and voted on by the People of the City of San Diego at an election held November 3, 1998.

(b) "MOU" shall mean the Memorandum Of Understanding Between The City Of San Diego, The Redevelopment Agency Of The City Of San Diego, The Centre City Development Corporation, And Padres L.P. Concerning A Ballpark District, Construction Of A Baseball Park, And A Redevelopment Project set forth in Proposition C.

(c) "People" shall mean the People of the City of San Diego.

(d) All other words and phrases defined in Section II of the MOU shall have the same meaning when used in this proposition.

Section 2. PURPOSES OF THIS PROPOSITION

(a) This proposition is enacted to declare and determine on behalf of the City that as of November 2, 1999, certain contingencies and conditions subsequent affecting obligations of the City set forth in various provisions of the MOU have failed, are unsatisfied, or are defeated by non-performance.

(b) This proposition is enacted in order to terminate as of November 2, 1999, contingent obligations of the City subject to contingencies and conditions subsequent that this proposition declares and determines have failed, are unsatisfied, or are defeated by non-performance.

(c) This proposition is enacted to provide that reinstatement or creation of similar obligations of the City which are terminated by this proposition shall require a two-thirds vote of the People in an election held for that purpose.

Section 3. FINDINGS AND DECLARATIONS

(a) The People find that as of November 2, 1999, the protections for the City's general fund and protections regarding certain general fund revenues in the MOU are insufficient in light of general fiscal concerns, for reasons expressed in the public debate of the project since the vote on Proposition C, e.g., by Don Bauder in a series of articles appearing in The San Diego Union-Tribune since the vote on Proposition C, and by the San Diego County Taxpayers Association for the fiscal health of the City as expressed in its analysis dated June 17, 1999, entitled, SDCTA Finds City Budget "Worrisome" – Association Says Revenue Projections Aggressive, and Spending Too High – Future Cuts in Services, and Risk to Bond Rating Possible.

(b) The People find that as of November 2, 1999, the proposal for a hotel as provided in Section IX of the MOU is unacceptable for reasons expressed in the public debate of the project since the vote on Proposition C, e.g., by Don Bauder in a series of articles appearing in The San Diego Union-Tribune since the vote on Proposition C and in an

analysis dated October 11, 1999, by the San Diego County Taxpayers Association entitled, SDCTA Opposes Publicly Financed Hotel – Calls Port District Plan "Ill-conceived & Unnecessary Public Risk".

(c) The People declare that is their intent that this proposition, among other things, establish policy for the City, and provide the ways and means for the implementation of that policy by such administrative and non-legislative acts as may be necessary and appropriate to carry out the purpose and intent of Proposition C and the MOU.

(d) The People declare that it is their intent that by this proposition the People shall directly exercise the discretion of the City as provided in the MOU, namely, that, unless specifically directed or prohibited to act in a particular manner by the MOU, each Party shall have the discretion, within its respective jurisdiction, to implement the MOU in the manner that, in its best judgment, is in its best interests.

Section 4. EXERCISE OF CITY'S DISCRETION

(a) Unless the following conditions subsequent and contingencies have been satisfied or waived and the respective satisfaction or waiver has been acknowledged by an official action of the San Diego City Council duly noticed as required by law on or before November 2, 1999, the following conditions subsequent and contingencies, or such of them as have not been so satisfied or waived, are hereby deemed for all purposes on or after November 2, 1999, unsatisfied, to have failed, and to have been defeated by non-performance. As a consequence, all obligations

under the MOU of the City contingent upon the satisfaction or waiver of any such condition subsequent or contingency are hereby terminated for all purposes on and after November 2, 1999, including, but not limited to, those that follow:

Pursuant to MOU Section XXXIII, Paragraph A. 1, the City is unable to obtain financing for the Ballpark Project on terms reasonably acceptable to the City.

Pursuant to MOU Section XXXIII, Paragraph A. 5, the City is unable to obtain sufficient additional financing investments, as set forth in MOU Section XIX, to fund the Ballpark Project.

Pursuant to MOU Section XXXIII, A. 6, the City is unable to agree on financial terms for the extension of the Padre's use and occupancy agreement for Qualcomm Stadium.

Pursuant to MOU Section XXXIII, B. 2, the City has not received from the Padres and/or Developer, by April 1, 1999, sufficient assurances that Phase 1 (including any Substitute Ancillary Development) will be substantially complete on or before March 31, 2002, and have the potential to generate the tax increment and Transient Occupancy Tax revenue necessary to help support the City and Agency Investments.

Pursuant to MOU Section XXXIII, B. 3, the City has not received necessary assurances that the Padres/Private Investment is secured as set forth in Section XVIII.

Pursuant to Section MOU Section IX, Paragraph A, the City, has not obtained funds from financing of its choice

(i.e. lease revenue bonds, certificates of participation, or other) to meet its respective investment obligations for Land Acquisition Costs, and all applicable statute of limitations for bringing any action challenging its financing have not passed, nor has a bridge loan or other interim financing been obtained in an amount sufficient for the City, to meet its respective investment obligations for Land Acquisition Costs.

Pursuant to Section MOU Section IX, Paragraph B, the Padres have not provided to the City the security for the Padres/Private Investment specified in MOU Section XVIII.

Pursuant to Section MOU Section IX, Paragraph C, the City has not received sufficient assurances from the Padres and/or others that Phase 1 (including any Substitute Ancillary Development) and the 1,000 room Convention Center Expansion hotel will proceed and have the potential to generate the required new public revenue to help finance the City and Agency Investments.

(b) The People hereby determine that as of November 2, 1999, that the terms and the ability for the City to obtain financing for the Ballpark Project are not reasonably acceptable; and on or after November 2, 1999, any decision as to whether the terms and the ability for the City to obtain financing for the Ballpark Project are or are not reasonably acceptable to the City shall require the affirmative consent of two-thirds of the voters of the City of San Diego voting at an election held for that purpose.

(c) Any waiver of the failure or satisfaction of any of the conditions subsequent deemed unsatisfied pursuant to the

terms of this proposition on or after November 2, 1999, shall require the affirmative consent of two-thirds of the voters of the City of San Diego voting at an election held for that purpose.

(d) Any reestablishment or revival of any obligations of the City terminated by this proposition or the creation of any similar obligations of the City on or after November 2, 1999, shall require the affirmative consent of two-thirds of the voters of the City of San Diego voting at an election held for that purpose.

(e) The adoption of this proposition by a majority of the voters of the City of San Diego voting at an election held for that purpose shall, retroactive to November 2, 1999, establish policy for the City on the matters set forth in this proposition, and provide the ways and means for the implementation of that policy by such acts, including but not limited to administrative and non-legislative acts, as may be necessary and appropriate to carry out the purposes and intent provided for in this proposition and in the MOU.

(f) The People's decision to exercise the City's discretion pursuant to the provisions of the MOU and to terminate all City obligations which may as a matter of law be terminated as of November 2, 1999, is also made pursuant to MOU Section XXXVIII, which states in pertinent part: "Except as specifically set forth in this MOU, this MOU may not be modified or amended without the affirmative vote of a majority of the electorate of the City voting at an election held for that purpose."

Section 5. CONSTRUCTION

This proposition shall be liberally construed to accomplish its purposes.

Section 6. SEVERABILITY

If any provision of this proposition, or the application of any such provision to any party to the MOU or circumstances, including, but not limited to, retroactivity, shall be held invalid, the remainder of this proposition to the extent it can be given effect, or the application of such provision to parties or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this extent the provisions of this proposition are severable.

Section 7. CALIFORNIA SUPREME COURT

The California Supreme Court shall, to the fullest extent possible, reform any provisions of this proposition that it, or any federal court, determines to be unconstitutional or contrary to any superseding provision of law in order that such provisions carry out the purposes of this proposition.

Section 8. STATUS OF PROPONENTS

The proponents of this initiative shall be included among any defendants in any judicial challenge to any provision of this proposition.

Section 9. EFFECTIVE DATE AND NOTICE

The provisions of this proposition shall be effective retroactive to the date of its publication on November 2,

1999. Immediate notice of enactment of this proposition and the actions taken pursuant to its terms by the People shall be given as provided in Section XLIII of the MOU.

--- End of Proposition ---

STATEMENT OF REASONS

A statement of the reasons for the proposed action as contemplated in said petition is as follows: The project presented to the voters of San Diego as Proposition C on November 3, 1998, has become unacceptable.

1. Date: November 1, 1999
   Signature of Proponent, /s/ Michael Kane Dunkl, 4361 Felton, San Diego, CA 92101
2. Date: November 1, 1999
   Signature of Proponent, /s/ Philip Zoebisch, 3318 Van Dyke Ave., San Diego, CA 92105

Appendix E - Padres' Complaint

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

PADRES, L.P., a Delaware Limited Partnership, Plaintiff, v. MICHAEL KANE DUNKL, an individual; PHILLIP ZOEBISCH, an individual; and DOES 1 through 20, Defendants.

CASE NO: GIC741207 COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTION

Plaintiff PADRES, L.P. ("PADRES") alleges as follows:

JURISDICTION AND VENUE

1. Jurisdiction and venue are proper in this court because PADRES has offices and does business within this judicial district; Defendants MICHAEL DUNKL and PHILLIP ZOEBISCH ("Defendants") are located, do business, and/or reside in this judicial district; the proposed initiative which is the subject of this action concerns a contractual relationship entered into and to be performed within this judicial district; the proposed initiative concerns a chartered city which is located within this judicial district and a city election to be administered within this judicial district; and the acts which are the subject of this action were or are to be performed within this judicial district.

PARTIES

2. PADRES is a Delaware limited partnership with offices in the City and County of San Diego, State of

California, and at all relevant times was doing business in the City and County of San Diego, State of California.

3. Defendants MICHAEL DUNKL and PHILLIP ZOEBISCH are individual residents of the City who are responsible for circulating the illegal and invalid proposed ballot initiative which is the subject of this action.

4. PADRES is ignorant of the true names and capacities of the Defendants sued herein as Does 1 through 20. PADRES is informed and believes that Does 1 through 20 were in some way responsible for the acts and omissions alleged herein. PADRES will amend this petition to state the true names and capacities of the fictitiously named respondents once they are ascertained.

FIRST CAUSE OF ACTION

(Declaratory Relief)

5. PADRES refers to paragraphs 1 through 4 of this Complaint and by reference incorporates those paragraphs as though fully set forth herein.

6. The City of San Diego ("City") is a California charter city. 11111

7. In November 1998, a large majority of the people of the City voted in favor of Proposition C, which expressly authorized City to enter into agreements to redevelop an area of downtown San Diego, including constructing a multiple use baseball park. A true and correct copy of Proposition C is attached hereto as Exhibit A.

8. Following the vote in favor of Proposition C, in December 1998, PADRES and City executed a valid and enforceable contract entitled "Memorandum of Understanding" ('MOU") concerning the construction of the baseball park and a redevelopment project as a means of implementing the legislative policy of Proposition C, all as expressly contemplated by Proposition C. Proposition C expressly authorized and directed City to enter into the MOU with PADRES. A true and correct copy of the MOU is attached hereto as Exhibit B.

9. Beginning on or about November 2, 1999, and continuing to the present, Defendants have submitted and/or circulated a proposed City ballot initiative which contains illegal and invalid provisions which would interfere with City's administrative legal rights and duties and with PADRES' constitutionally protected contractual relationship with City under the MOU. A true and correct copy of the proposed initiative is attached hereto as Exhibit C.

10. PADRES is a beneficiary of the approved ballpark development project and the MOU and brings this action to challenge a proposed ballot initiative concerning the ballpark project and the MOU. With its interest in the MOU and the funding and completion of the baseball park, PADRES is directly affected by the proposed initiative and is beneficially interested in and aggrieved by the potential submission of the proposed initiative. The mere threat of the proposed initiative in and of itself interferes with the ability of PADRES and City to proceed with the ballpark project in a timely and efficient manner consistent with the provisions and intent of Proposition C and the MOU.

11. Defendants' proposed initiative is legally invalid for at least the following reasons:

a. California Constitution, Article 2, Section 8(a) and San Diego City Charter Section 23, establish the right of the electorate to enact legislation by ballot initiative. Initiatives which do not legislate, but instead purport to exercise or control government administrative or executive actions, or to pronounce policy which purports to direct an elected body, are legally improper. The proposed initiative is illegal because it is not legislation; rather, it is an improper attempt to exercise or control administrative or executive action and adopt a statement of policy.

b. Article 1, Section 10 of the United States Constitution and Article 1, Section 9 of the California Constitution prohibit laws which impair the obligations of contracts. The proposed initiative violates these contractual impairment provisions by interfering with the contractual rights and obligations of City and PADRES under the MOU.

c. Initiatives which imperil essential government functions are invalid. The initiative improperly interferes with the essential government function of financing City activities and obligations.

d. An initiative is improper if it would hinder or delay executive government conduct, as this would impair the efficiency necessary to the successful government administration. The MOU is the means by which City is implementing a legislative policy previously declared in Proposition C. The MOU, which the voters expressly approved when overwhelmingly passing Proposition C, and Proposition C itself, both expressly provide that the

MOU and Proposition C are the only legislative acts necessary to establish City policy concerning the redevelopment and ballpark project, and provide the ways and means for implementing that policy through administrative and non legislative acts appropriate to carry out that policy. Implementing and carrying out the MOU, including determining whether the conditions subsequent prescribed in the MOU have been satisfied, are administrative or executive acts in furtherance of pre-existing public policy determination and legislation, and are not properly the subject of an initiative.

e. The proposed initiative purports to make various "findings and declarations." Such factual findings are administrative in nature and are not subject to initiative.

f. The proposed initiative contains false and misleading statements. For example, Section 4(a)(4) purports to find that City has not received from PADRES and/or Developer, by April 1, 1999, sufficient assurances that Phase 1 will be substantially complete on or before March 31, 2002, and have the potential to generate the tax increment and Transient Occupancy Tax revenue necessary to help support the City and Agency investments. In fact, City, through its Council, has previously and correctly determined such sufficient assurances have been given.

g. An initiative which alters or interferes with implementing a redevelopment plan is illegal.

12. For at least each of the foregoing reasons, the proposed initiative is illegal, invalid, and beyond the power of the San Diego electorate to adopt.

13. PADRES seek by this action to prevent a waste of public funds pursuant to Code of Civil Procedure Section 526a. In addition, PADRES seek to enforce City's public duty and to protect the interests of the public at large, who are the persons protected by the constitutional, statutory, and municipal laws. PADRES and other City citizens and taxpayers will suffer great and irreparable harm if Defendants are not prohibited from placing the illegal initiative on the ballot.

14. An actual controversy has arisen and now exists between PADRES and Defendants concerning the* respective rights and duties. PADRES contend the proposed initiative is invalid and beyond the power of the electorate to adopt in the first instance PADRES are informed and believe Defendants dispute these contentions and contend the proposed initiative is legal and valid.

15. PADRES desire a judicial determination of the* rights and duties, and a declaration as to the right of PADRES and City to fulfill the obligations and obtain the benefits of the MOU without interference.

16. A judicial declaration is necessary and appropriate at this time in order that PADRES, City, and Defendants may ascertain their rights and duties under Proposition C, the MOU, related City actions, and the proposed initiative so the parties to the MOU may continue to perform their obligations and obtain their benefits without the uncertainty and interference created by the proposed initiative.

17. PADRES have no plain, speedy, or adequate remedy at law other than the relief sought in this

Complaint, as neither administrative nor appellate review is available to redress Defendants' actions and threatened actions.

SECOND CAUSE OF ACTION

(Injunctive Relief)

18. PADRES refers to paragraphs 1 through 176 of this Complaint and by reference incorporates those paragraphs as though fully set forth herein.

19. Unless Defendants are restrained and enjoined from placing the proposed initiative on the ballot, Defendants' actions and threatened actions will continue to cause irreparable harm to PADRES, to City, and to all citizens of City in that Defendants' actions will waste taxpayers' funds and will interfere with the ability of PADRES and City to proceed as authorized, directed and required by Proposition C, the MOU and other applicable laws and agreements. The resulting waste and damage will not be recoverable from anyone, and the fraud on City's citizens is not compensable with money. In addition, the purpose of the United States and California Constitutions, the City Charter, and other statutes to protect the public will be defeated.

20. Defendants will not be harmed if they are restrained from placing the illegal initiative on the ballot, and the general public will benefit from a restraining order and injunctions because they will not be confused and misled by the illegal initiative and no taxpayer funds will be wasted.

21. PADRES has no plain, speedy, or adequate remedy at law other than the relief sought in this Complaint, as neither administrative nor appellate review is available to redress Defendants' actions and threatened actions.

22. PADRES request this court issue an injunction enjoining Defendants from placing the proposed initiative on any ballot, or expending any public funds on the proposed initiative.

WHEREFORE, PADRES pray judgment against Defendants and each of them as follows:

1. For a declaration that the proposed initiative is invalid and PADRES and CITY have the right to fulfill their obligations under the MOU and Defendants are prohibited from placing the proposed initiative on any ballot or expending any public funds on the proposed initiative;

2. For an injunction enjoining Defendants from placing the proposed initiative on the ballot;

3. For attorneys fees and costs; and

4. For all other and further relief as the court may deem proper.

Dated: January 4, 2000

Signed: /s/ GRAY CARY & FREIDENRICH LLP By MARK C. ZEBROWSKI Attorneys Plaintiff PADRES, L.P; a Delaware Limited Partnership

[Exhibits omitted]

Appendix F - California SLAPP Statute

California Code of Civil Procedure §425.16

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)

(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence

at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs.

If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;

(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;

(4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.

(j) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(k) (1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or fax, a copy of the endorsed-filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees. (2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

[Formatting Added]

Supreme Court, U.S.
FILED
AUG
CLERK

No. 01-136

In The

Supreme Court of the United States

MICHAEL KANE DUNKL and JERRY MAILHOT,

Petitioners,

v.

THE CITY OF SAN DIEGO and PADRES L.P.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. One of the petitioners was a sponsor of an initiative petition that is facially outside the power of the voters of the City of San Diego to enact. The existence of the initiative petition imperiled financing a voter approved capital project. The City of San Diego filed a declaratory relief action against the sponsors to establish that the petition was outside the power of the voters to enact. Does the First Amendment forbid such an action during the period in which an initiative's sponsors are gathering signatures to place the invalid initiative on the ballot?

2. The voter approved capital project involved a contract with Padres L.P., a non-governmental entity. Padres L.P. filed a declaratory relief action against the sponsors that was similar to the City of San Diego's action. The actions were consolidated. Does the First Amendment forbid a suit by a private party to declare a proposed initiative facially beyond the power of the voters to enact while the sponsors are gathering signatures to place it on the ballot?

PARTIES TO THE PROCEEDINGS

The City of San Diego objects to the petition's statement of parties to the proceedings. The initiative sponsors and defendants-appellants below were Michael Kane Dunkl and Philip Zoebisch. *See* Pet. at A-4, A-31, A-37, A-50. Jerry Mailhot, who is listed as a petitioner, is a stranger to the proceedings below.

The identification of the respondents is correct.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The City of San Diego ("City") urges that the petition for certiorari be denied. In this answer, "petitioner" refers to Michael Kane Dunkl, who is a petitioner and who was a party to the proceedings below. Philip Zoebisch, who was a party to the proceedings below, has not joined in the petition. Jerry Mailhot was not a party to the proceedings below, and accordingly the City does not recognize him as a petitioner.

OPINIONS BELOW

The City objects to the petition's listing of opinions below. Both the listing and petitioner's appendix omit the California Superior Court's order granting summary judgment and the judgment, which are required contents of the appendix. SUP. CT. R. 14(i)(i). Appendix A to this answer is the order and Appendix B is the judgment.

The City also objects to the appendix on the ground it omits the matters required by Supreme Court Rules 15(g)(i) and 15(i)(v). The petitioner's inability to supply a record complying with the rules is a reason to deny the petition.

STATEMENT OF THE CASE

A. The Voter Approved Ballpark and Redevelopment Project.

Voters of the City decided in 1998 to redevelop part of downtown San Diego. Consolidated Respondents' Appendix in Lieu of Clerk's Transcript[1] ["R.A."] at 442, 450-53. They included a new Major League Baseball park in the redevelopment. *Id.* They decided the City would invest $225,000,000 in the project, and they directed the City Council to proceed with the project. *Id.* at 451, 475. Proposition C was the means by which the voters adopted the redevelopment project. *Id.* at 442, 450-53. Proposition C directed the City and two related entities to execute the project through, among other things, a contract with Padres L.P. ("Padres"), the owner of the local Major League Baseball franchise. *Id.* The contract is titled "Memorandum of Understanding" and is often abbreviated "MOU." *Id.*

As one would expect for such an undertaking, the MOU contained contingencies. Among them, the City Council was required to select a method of financing the City's $225,000,000 investment and to make the investment if it found the financing could be accomplished "on terms reasonably acceptable to the City and on a fully tax-exempt basis. . . . " R.A. at 494, ¶ XXXIII. A. 1.

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[1] An appendix in lieu of clerk's transcript is a party-assembled record on appeal of the papers filed in the trial court. CAL. CT. R. 5.1. It is not unlike an appendix under FED. R. APP. P. 30 in circuits that permit filing of photocopies rather than printing.

Dunkl and Zoebisch, through the lawyer who represents Dunkl here, prepared a ballot initiative ("Proposed Initiative") to derail the redevelopment project. R.A. at 526-32. The Proposed Initiative would have substituted the voters for the City Council as the body to select a means of financing and to determine whether the terms of financing were reasonably acceptable. *Id.* at 528, § 2(a), at 529, § 3(d). Then, although it neither selected a means of financing nor identified financing terms, the Proposed Initiative purported to exercise the City Council's fact-finding power and to determine that the financing terms were unacceptable. It would have found that other conditions of the MOU failed as well. *Id.* at 529-30, § 4(a) & (b).

The Proposed Initiative as a potential ballot measure prevented financing the redevelopment project. R.A. at 196-99, 216-32. Because enactment of the Proposed Initiative, if it was within the voters' power to enact, would have prevented performance of the MOU, the Proposed Initiative created the appearance that there might be no project to generate revenue to pay the bonds. As a result, participants in the municipal bond market could not and would not price the tax-exempt bonds that need to be sold to finance the project. *Id.*

B. Summary of Proceedings Below.

The City sued Dunkl and Zoebisch in California Superior Court for declaratory relief that the Proposed Initiative was beyond the power of the voters to enact. Pet. at A-37-41. The City alleged that the Proposed Initiative was facially void because it proposed action that was

wholly within the administrative power of the City Council rather than within the legislative power shared by the City Council and the electorate. Pet. at A-38-39. The City also sought an injunction forbidding the proponents from filing the Proposed Initiative with the City Clerk for ballot certification. Pet. at A-39-40.

Padres simultaneously filed an action on the same grounds and on grounds not raised by the City. Pet. at A-50-57. The court coordinated the actions. R.A. at 646-47.

Because the Proposed Initiative threatened the project, the Superior Court specially set motions for summary judgment in which the City and Padres raised the administrative-legislative distinction. R.A. at 189-99, 647.

Dunkl and Zoebisch responded by moving to dismiss both actions under a California statute designed to terminate quickly "Strategic Lawsuits Against Public Participation." R.A. at 185-88; CAL. CIV. PROC. CODE § 425.16. The statute is commonly referred to by the acronym "SLAPP." A defendant invokes the statute by showing that the suit affects the exercise of constitutional rights of free speech or petition in connection with a public issue. CAL. CIV. PROC. CODE § 425.16(b)(1). To avoid dismissal of the action, the plaintiff then must show it will probably prevail on the claim. (*Id.*)

In the course of hearings on the SLAPP and summary judgment motions, Dunkl and Zoebisch conceded that the legislative or administrative characterization of the Proposed Initiative is a question of law to be decided by the court, R.A. at 1347:25-1348:3, and that the City's choice of

methods of financing its investment in the Ballpark Project is an administrative determination that is not subject to initiative, *id.* at 1404:27-1405:3. They also stated the Proposed Initiative was "dead" if the court declared it invalid. *Id.* at 1315:5-7, 1316:25; *see id.* at 980.

The court granted the City's motion for summary judgment. *Infra* at App. 1-5. It also found the SLAPP motions were moot because the City and Padres had prevailed on the merits. *Id.* at App. 5. The court entered judgment declaring the Proposed Initiative void because it would take only administrative acts. *Id.* at App. 6-7.

Dunkl and Zoebisch timely appealed. Both the judgments and the denial of the SLAPP motions were appealable under California law. CAL. CIV. PROC. CODE §§ 425.16(j) & 904.1(a)(1).

The California Court of Appeal affirmed. *City of San Diego v. Dunkl*, 103 Cal.Rptr.2d 269 (Cal. Ct. App. 2001). Dunkl and Zoebisch filed no petition for rehearing in the appellate court. The California Supreme Court denied their petition for review. Pet. at A-1.

C. Limited Constitutional Discussion Below

1. No Constitutional Issue in Superior Court.

The SLAPP statute applies to acts "in furtherance of a person's right of petition or free speech under the United States or California Constitution. . . . " CAL. CIV. PROC. CODE § 425.16(b), (e). In the trial court, Dunkl and Zoebisch therefore argued in general that their conduct in circulating an initiative petition was protected speech and petition activity. R.A. at 174-76, 187. The only evidence

they filed was a two-page declaration in which Zoebisch explained why he supported the Proposed Initiative and why he feared the cost of defending the suit. *Id.* at 183-84. Dunkl and Zoebisch's papers lacked any constitutional argument that a local government was barred from suing initiative proponents for a declaration that a circulating petition proposed a measure facially outside the power of the voters to enact. *Id.* at 174-87. Rather, they contended that under the City Charter, the City was required to sue its own clerk over the validity of a measure. *Id.* at 177-180.

The City did not contest whether circulating an initiative petition is, in general terms, protected speech and petition activity. R.A. at 883-901.

In their reply, Dunkl and Zoebisch again did not make any constitutional argument that a local government was barred from suing initiative proponents for a declaration that a circulating petition proposed a matter facially outside the power of the voters to enact. R.A. at 967-1016. They continued to contend that the City Charter and ordinances made the case unripe. *Id.* at 978-82. They contended for the first time that the court could not enjoin them from presenting the Proposed Initiative to the City Clerk, basing that argument on a California Supreme Court case limiting governmental agencies' right to sue for malicious prosecution. *Id.* at 1007 – 09. In connection with that argument, they admitted the jurisdiction of the court to enjoin presentation of an invalid initiative. *Id.* at 1012. They argued – without any authority, constitutional or otherwise – that "the court must take into account the need to balance the public interest in avoiding placing [an] invalid initiative on the ballot

against the danger that preelection litigation will chill the initiative process. . . . " *Id.* In support, Zoebisch filed a declaration stating that the litigation had impaired his effort to gather signatures but providing no facts about the cost of the process, the number of signatures gathered, or any other relevant point. *Id.* at 1019.

In opposition to summary judgment, Dunkl and Zoebisch repeated their argument against an injunction, R.A. at 1140, but made no constitutional argument against declaratory relief. *Id.* at 1131-41.

2. *No Constitutional Issue in Court of Appeal.*

In the California Court of Appeal, Dunkl and Zoebisch failed to argue that the City's suit was barred by a constitutional immunity. Instead, they repeated the uncontested point that their constitutional rights of speech and petition made the anti-SLAPP statute applicable to the City's action. Appellant's [sic] Opening Brief at 6-11. Based on that argument, they claimed that their SLAPP motion was not moot when the Superior Court decided the merits of the case against them. *Id.* Nowhere in arguing against the judgments did Dunkl and Zoebisch contend they were constitutionally immune from suit while they were circulating the initiative or afterward. *Id.* at pp. 12-39. The first hint of an argument for constitutional immunity from suit while circulating an initiative petition occurred in Dunkl and Zoebisch's reply brief, where it was presented with citations to California authority but without analysis to suggest it was anything other than a claim of error based on the fact that the City's complaint sought an injunction against filing the

Proposed Petition. Appellants' Reply Brief at 1. In short, it would have taken psychics, not judges, to predict that Dunkl would later raise the issues presented in his current petition.

The Court of Appeal did not discuss the issues presented in the petition for the obvious reason that they were not raised. See Pet. at A-3-30. Rather, the Court of Appeal took Dunkl and Zoebisch's procedural arguments for what they were – an attempt to extend California's prohibition of malicious prosecution suits by governmental agencies into a blanket prohibition of challenges to ballot measures before the voters vote. (Pet. at A-17.) Dunkl and Zoebisch filed no petition for rehearing in the California Court of Appeal.

3. California Supreme Court Petition.

In their petition for review to the California Supreme Court, Dunkl and Zoebisch finally stated the substance of the issues presented in Dunkl's petition here.

ARGUMENT

I.

OBJECTIONS TO STATEMENTS OF FACT AND LAW AND TO CONSIDERATION OF QUESTIONS PRESENTED

Supreme Court Rule 15.2 admonishes parties opposing a petition for writ of certiorari to address perceived misstatements of fact or law and to state their objections

to consideration of questions presented that do not go to jurisdiction. The objections are legion.

A. Misstatements of Fact and Law.

1. The petition is purportedly filed on behalf of Jerry Mailhot, who is not a party to the proceedings below.

2. The matters stated as fact in the first two paragraphs of the Statement of Facts and Procedural Issues are not in the record.

3. In the fourth paragraph of the Statement of Facts and Procedural Issues (Pet. at 4) and persistently thereafter, the petition states as purported fact that the City and Padres are engaged in a "joint business venture" or "partnership." These are legal conclusions, not facts. The issue of the nature of the relationship between the City and Padres was not adjudicated in this or any other case.

4. The matters stated as fact in the paragraph at the top of page 5 are not in the record.

5. The matters stated as fact in the top three paragraphs of page 11 are not in the record.

6. The matters stated as fact in the final paragraph of page 15 are not in the record.

7. The argument at pages 16 through 20 misstates California law. This point will be addressed in parts II.A.3 and II.B, *infra*.

B. Objections To Consideration of Issues

1. The issues presented by the petition were not presented to the California Superior Court.

2. Petitioner admitted that the issues presented in the petition were meritless when he admitted the jurisdiction of the court to enjoin presentation of an invalid initiative. R.A. at 1012.

3. The issues presented by the petition were not presented to the California Court of Appeal in Dunkl's opening brief on the merits or comprehensibly in any brief or argument.

4. The issues presented by the petition were not discussed by the California Court of Appeal in its decision. When the California Court of Appeal does not discuss an issue which a party desires to tender to the California Supreme Court for review, the party must raise the issue by petition for rehearing to the Court of Appeal. CAL. CT. R. 29(b)(2). The same is true if the party desires to disagree with or add to the facts as recited by the Court of Appeal. *Id.* As a result, the issues presented by the petition were never properly addressed to the California Supreme Court.

II.

THE PETITION FAILS TO MEET THE CRITERIA FOR CERTIORARI

A. Nothing Here Fits Within the Rule 10 Criteria for State Court Cases.

Supreme Court Rule 10 identifies the kinds of state court cases that may justify review on writ of certiorari. First, a state court of last resort may have created a conflict in authority on an important federal question. SUP. CT. R. 10(b). Second, a state court of last resort may have decided an important federal question that should be settled by the Supreme Court. SUP. CT. R. 10(c).

1. The Petition Raises Issues Not Decided Below.

The petition's first hurdle should be showing that the opinion below decided the questions raised in the petition. After all, a California appellate court opinion that does not consider a point is not precedent on that point. *Ginns v. Savage*, 393 P.2d 689, 691 n. 2 (Cal. 1964). A decision of California's intermediate appellate court, then, does not create a conflict or even take a position on an important federal question if it does not decide that question.

Dunkl's petition balks at the first hurdle. The Court of Appeal's decision does not discuss whether Dunkl had a federal constitutional immunity from suit while he was involved in circulating a petition. Rather, that court took Dunkl's arguments as presented in the briefs. The only apparent constitutional argument presented was whether

the California Supreme Court's application of the First Amendment to malicious prosecution suits barred any review of a ballot measure before the voters could vote on it. *See* Pet. at A-17. The issue Dunkl now presents – one focused exclusively on the timing of an action and the asserted burden of a suit during the circulation period – wasn't discussed.

2. No Conflict in Authority.

Indisputably, the decision below created no conflict of authority. The issues stated in the petition have never been decided by any court, state or federal.

3. No Important Federal Question.

If Dunkl had preserved and the courts had decided his issues below, his petition still would not present an important federal question. This case is not important in fact or in legal principle.

First, this case is nearly unique. There is no need for further judicial intervention. Dunkl argues the practical importance of the petition by selectively quoting from a Wall Street Journal editorial. Pet. at 2. That editorial says nothing about the chilling effect of prequalification suits on efforts to gather signatures; it urges judicial restraint in disqualifying initiatives on substantive grounds. Anonymous, *Ducking the Initiative*, THE WALL STREET JOURNAL, Sept. 6, 2000, at A26. Reported decisions, law review articles, and other reputable sources contain no evidence that state or local initiative processes are suffering undue

impact from suits to test whether proposed measures are within the power of voters to enact.

Contrary to the petition's rhetoric, California Supreme Court authority limits judicial invalidation of initiatives to those which, on their face, are outside the power of the voters to enact. *Senate v. Jones*, 988 P.2d 1089, 1095-96 (Cal. 1999). California courts are admonished not to intervene before an election when an initiative is challenged on account of its substantive invalidity. *Id.* Rather, challenges are limited to those provisions and principles of political law that describe the voters' reserved power – the single subject rule and the legislative acts rule being the primary examples. *Id.* This case not only involved the legislative acts rule, it involved a compelling public interest in immediate judicial intervention because the mere existence of the Proposed Initiative made it impossible for the City to complete a voter-approved project. R.A. at 196-99, 216-32.

Second, the petition presents no genuine federal question because the Constitution grants no right to citizens of a state to initiate legislation. The Constitution guarantees "to every state a republican form of government. . . . " U.S. CONST., art. IV, § 4. It does not guarantee that state constitutions or city charters must permit direct legislation by citizens. In the Supreme Court's latest decision about First Amendment constraints on regulation of advocacy related to initiatives, the Court was careful to describe Colorado as among the "States allowing ballot initiatives. . . . " *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 191 (1999). It cited with approval two cases holding that there is no First Amendment petition right of direct citizen legislation. *Id.* at 191-92, citing

Biddulph v. Mortham, 89 F.3d 1491, 1494, 1500-01 (11th Cir. 1996), *cert. denied*, 519 U.S. 1151 (1977) and *Taxpayers United For Assessment Cuts v. Austin*, 994 F.2d 291, 293-94, 296-97 (6th Cir. 1993).

Because there is no federally guaranteed right to initiate legislation, the petition tries to connect this case with decisions involving restrictions on First Amendment speech about ballot initiatives. Legally, no such connection exists. What the state did here was declare that the Proposed Initiative was outside the power of the voters to enact; it took no action to impair advocacy of the views reflected in the Proposed Initiative or even to regulate how signatures may be gathered. The petition offers no reason why judicial declarations of invalidity fall outside the basic principle stated in *Buckley*: "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process. . . ." *Buckley*, 525 U.S. at 191. It is hard to imagine a less obtrusive protection of the integrity of the process than a judicial declaration whether the voters have the power to enact a measure.

Lacking a record of real-life problems and lacking a constitutional principle, the petition assumes that suits over the validity of initiatives at all times and in all ways overburden the advocacy related to direct legislation. Surely a petition should present some record of actual disruption of constitutionally protected activities when it argues the importance of an issue this way. But what this petition does is refute itself. The only practical consequence it can identify of a suit to declare an initiative outside the voters' reserved power is that the unlawful initiative does not reach the ballot. This does not chill

First Amendment advocacy on a public issue. Rather, Dunkl's concession in the trial court was correct – the court had jurisdiction, and whether to act is a fact-based matter, not a constitutional matter.

B. The Petition Misstates California Law About Preelection Review of Initiatives.

The petition contends California courts treat initiatives as second class legislation. Pet. at 16-20. Not so.

First, the petition is dead wrong to say that in "California voter initiatives are judicially reviewed as 'proposed' rather than 'enacted' legislation." Pet. at 16. Preelection review is limited to whether the measure is within the power of the voters to enact. *Senate v. Jones*, 988 P.2d at 1095-96.

From the initial false premise many errors follow. For example, the petition recites standard rules presuming the constitutionality of legislation and claims the courts fail to follow them in preelection review. Pet. at 16-17. This is wrong. Courts don't recite rules about constitutional validity in preelection review cases because the constitutionality of the measure if enacted is not at issue. Rather, the issue is whether the voters have the power to enact the measure.

C. Because Dunkl Does Not Challenge the Substance of the Declaratory Judgment and Zoebisch Dropped Out, the Petition Is Moot.

There is no conceivable point to litigating this case in the Supreme Court. The California Court of Appeal has

held that the Proposed Initiative was outside the power of the City's voters to enact. The petition does not challenge that solid state law ruling. Rather, the petition's core concept is that the *correct* determination of invalidity was premature. And the appropriateness of the timing of that correct determination is final beyond review as to Zoebisch, who did not join Dunkl's petition. The Supreme Court should not be a forum to litigate theoretical questions raised by only one of two theoretically affected parties.

CONCLUSION

A famous artist is quoted as saying of a Northern California city, "There's no there there." She accurately anticipated the contents of the petition for certiorari in this Southern California case.

Respectfully submitted,

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APPENDIX A:
ORDER GRANTING SUMMARY JUDGMENT

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

CITY OF SAN DIEGO, a California chartered city, Plaintiff, v. MICHAEL KANE DUNKL, an individual; and PHILLIP ZOEBISCH, an individual, Defendants.	CASE NO.: GIC 741206 **ORDER GRANTING SUMMARY JUDGMENT FOR PLAINTIFF CITY OF SAN DIEGO** (Filed March 17, 2000)

The motion of plaintiff City of San Diego ("City") for summary judgment came on for hearing on February 28, 2000 in Department 75 of the above-entitled court, Honorable Judith B. McConnell presiding. The City appeared by and through its counsel of record, City Attorney Casey G. Gwinn and Charles A. Bird of Luce, Forward, Hamilton & Scripps LLP. Defendants Michael Kane Dunkl and Phillip Zoebisch ("Defendants") appeared by and through their counsel of record Kent C. Wilson and J. Bruce Henderson. The Court read and considered the papers and records on file in this action and the argument of counsel, and good cause appearing therefor, it is hereby ORDERED:

1. City's unopposed request for judicial notice is granted. The request by Defendants for judicial notice of all contents of the court file is granted to the extent the

court takes judicial notice of the existence of such documents but not of the truth of the contents of such documents.

2. The court construes the declaration of Kent C. Wilson filed February 18, 2000, in opposition to the motions for summary judgment as a request for a continuance pursuant to Code of Civil Procedure section 437c, subdivision (h). This request is denied. Further discovery concerning the contractual issues is irrelevant because the court, in reaching its decision, does not deal with those issues. The remaining proposed discovery would not lead to controverting evidence because the sole issue raised by the motion for summary judgment is a legal issue.

3. The court declines to rule on specific evidentiary objections. The court disregards all evidence which is found to be incompetent or inadmissible. (*Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419.)

4. The motion for summary judgment is granted. There is no triable issue of material fact and no defense as to the validity of the initiative petition being circulated by defendants. The judicially noticed documents including Proposition C, the Memorandum of Understanding authorized by Proposition C, and Defendants' proposed initiative show that no triable issue of fact exists. Further, Defendants offered the same evidence.

5. The court notes that preelection review of an initiative is rarely undertaken by a court and should be done only where there are clear and compelling reasons to do so. As stated by our Court of Appeal in *Wiltshire v. Superior Court* (1985) 172 Cal.App.3d 296:

> The initiative power is " 'one of the most precious rights of our democratic process.' " Courts have repeatedly stressed it is more important to review challenges to initiative measures after an election rather than to disrupt the electoral process by preventing exercise of the people's right to vote. An exception to this judicial restraint arises on a showing the proposed initiative is beyond the power of the voters to adopt or is not legislative in character. (*Id.*, at p. 302 [citations omitted].)

6. As in *Wiltshire,* such a showing has been made. The proposed initiative falls within the exception, and preelection review is proper.

7. Furthermore, the California Supreme Court has observed that preelection review is appropriate when the challenge to an initiative is based upon a claim, as here, that the proposed measure may not be properly submitted to the voters because the measure is not legislative in character. (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687

> The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure. (*Id.*, at p. 697.)

8. The initiative that is before the court reads, in part, as follows:

Section 2. Purposes of this Proposition

(A) This proposition is enacted to declare and determine on behalf of the City that as of November 2, 1999, certain contingencies and conditions subsequent affecting obligations of the City set forth in various provisions of the MOU have failed, are unsatisfied, or are defeated by non-performance.

(B) This proposition is enacted in order to terminate as of November 2, 1999, contingent obligations of the City subject to contingencies and conditions subsequent that this Proposition declares and determines have failed, are unsatisfied, or are defeated by non-performance.

9. The initiative goes on to make certain "findings and declarations" including that it is the people's intent "to carry out the purpose and intent of Proposition C and the MOU" and to " . . . exercise the discretion of the City as provided in the MOU. . . . " The factual findings contained in the proposed initiative are those typically made by a governing entity in an administrative decision. Such fact-finding in an initiative is impermissible.

10. The proposed initiative, in sum, makes only administrative decisions to undermine a measure previously adopted by the voters. If the proponents wish to speak out publicly, write letters, or in any other way attempt to influence the public and the City Council to take the action proposed here, they may do so, but they may not use the initiative process to express their concerns about any possible failings in the ballpark project unless they clearly do so by a legislative act.

11. In light of this ruling, Defendants' special motion to strike "SLAPP" suit is moot.

12. The City is directed to prepare a proposed judgment and submit it for the court's approval no later than March 13, 2000.

Dated: March 17, 2000

/s/ Judith D. McConnell
Judith D. McConnell
Judge of the Superior Court

APPROVED AS TO FORM:

March 13, 2000

Luce, Forward, Hamilton & Scripps LLP

By: /s/ Charles A. Bird
Charles A. Bird
Attorneys for Plaintiff the City of San Diego

March 13, 2000

/s/ Kent C. Wilson
Kent C. Wilson
Attorney Defendants Michael Kane Dunkl and Phillip Zoebisch

APPENDIX B:
JUDGMENT

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

CITY OF SAN DIEGO, a California chartered city, Plaintiff, v. MICHAEL KANE DUNKL, an individual; and PHILLIP ZOEBISCH, an individual, Defendants.	CASE NO.: GIC 741206 **DECLARATORY JUDGMENT FOR PLAINTIFF CITY OF SAN DIEGO** (Filed March 17, 2000)

The motion of plaintiff City of San Diego for summary judgment came on for hearing on February 28, 2000 in Department 75 of the above-entitled court, Honorable Judith D. McConnell presiding. The City of San Diego appeared by and through its counsel of record, City Attorney Casey G. Gwinn and Charles A. Bird of Luce, Forward, Hamilton & Scripps LLP. Defendants Michael Kane Dunkl and Phillip Zoebisch ("Defendants") appeared by and through their counsel of record Kent C. Wilson and J. Bruce Henderson. The Court read and considered the papers and records on file in this action and the argument of counsel, and good cause appearing therefor, it is hereby. ORDERED, ADJUDGED AND DECREED as follows:

1. The Initiative Petition signed by Defendants as proponents is a legally invalid initiative which is beyond the power of the voters to enact because it seeks to

undertake administrative rather than legislative action. A true and correct copy of the Initiative Petition is attached to this judgment as Exhibit A.

2. Each party shall bear his or its own costs and fees.

Dated: March 17, 2000

/s/ Judith D. McConnell
Judith D. McConnell
Judge of the Superior Court

APPROVED AS TO FORM:

March 13, 2000

Luce, Forward, Hamilton & Scripps LLP

By: /s/ Charles A. Bird
Charles A. Bird
Attorneys for Plaintiff the City of San Diego

March ___, 2000

/s/ (not approved)
Kent C. Wilson
Attorney Defendants
Michael Kane Dunkl and
Phillip Zoebisch

[Exhibit Omitted As Duplicative. Please See Petition At A-41 Through A-49.]

SUPREME COURT, U.S.
FILED
AUG 2001
OFFICE OF THE CLERK

No. 01-136

IN THE

Supreme Court of the United States

MICHAEL KANE DUNKL and JERRY MAILHOT,

Petitioners,

v.

THE CITY OF SAN DIEGO and PADRES, L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF IN OPPOSITION FOR RESPONDENT PADRES, L.P.

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JOINDER IN CITY OF SAN DIEGO'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief addresses only issues raised by the Petition for Writ of Certiorari ("petition") unique to respondent Padres, L.P. ("Padres"). Padres hereby joins in the City of San Diego's ("City") Brief in Opposition to Petition for Writ of Certiorari ("Br. Opp."), including particularly the sections at i, ii, and 1 through 8, which are not included in this brief except to add new matter.

STATEMENT OF THE CASE

In November 1998 the City's voters approved Proposition C by a nearly 60-40 margin. Petition at A-6. Proposition C directed the City to enter into a contract titled Memorandum of Understanding ("MOU") with the Padres, among others. Consolidated respondents' Appendix in Lieu of Clerk's Transcript ("R.A.") at 452. Proposition C and the MOU provide for the construction of a redevelopment project that includes a new ballpark. That ballpark is to be used by the Padres, which owns the local Major League Baseball franchise. *Id.* at 450, 460, 467.

In November 1999 Michael Kane Dunkl and Philip Zoebisch began circulating a proposed voter initiative ("initiative" or "proposed initiative").[1] R.A. at 3. If enacted, the initiative would have made factual findings that would have terminated the MOU and thus ended the redevelopment project, including the new ballpark. *Id.* at 528.

The Padres sued for declaratory relief soon after the initiative proponents began collecting signatures. *Id.* at 1.

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1. As the City notes, Zoebisch is not a petitioner in this Court and Jerry Mailhot is a stranger to this action. Br. Opp. at ii.

The City filed a similar action. *Id.* at 89.[2] Proposition C recites that a task force found that a new ballpark is necessary for the Padres to remain competitive and financially stable. *Id.* at 450. In addition, the Padres presented evidence below that unless the new ballpark is built in a timely manner, the Padres would lose tens of millions of dollars in revenue and construction delay costs. *Id.* at 218-19. In fact, if the new ballpark ultimately is not built, the Padres likely cannot remain in San Diego. *Id.* at 220.

REASONS FOR DENYING THE WRIT

A. The Initiative's Requirement That Its Proponents Be Named as Defendants Waived Any Claim They Cannot Be Sued During the Signature-Gathering Period.

Section 8 of the proposed initiative states: "The proponents of this initiative shall be included among any defendants in any judicial challenge to any provision of this proposition." R.A. at 531. Contrary to Dunkl's claim, nothing in this section or elsewhere in the proposed initiative suggests the section was to be effective only after the voters enacted it. Petition at A-19. Dunkl thus waived the only issue he purports to raise in the petition.

B. The Padres Did Not Engage in State Action or Lose Its Own Petition Rights Because of Its Arms-Length Contract With the City.

The petition must show the Padres engaged in state action when it sued the initiative's proponents for declaratory relief. Recognizing this, the petition suggests the Padres' independent declaratory relief action meets the color of law

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2. The Padres and City also asked the trial court to enjoin the proponents from presenting the proposed initiative to the City's clerk should the court find the initiative beyond the voters' power to adopt. R.A. at 6-7, 91-92. These requests were withdrawn before the judgments were entered. *Id.* at 1242, 1393.

requirement because the Padres was the City's "joint venture business partner." Petition at 24-25, 12, 13, 23. The record does not support the claim.[3]

First, the Padres did not act jointly or otherwise with the City in suing Dunkl. The Padres filed its own complaint and motion for summary judgment, received its own judgment, and separately briefed and argued the case in the California Court of Appeal. R.A. at 1, 206, 233, 235, 1425 (Padres' judgment), 1439 (City's judgment); Petition at A-4. The Padres also made arguments in its motion and appellate brief that could have resulted in the City's being held liable to the Padres for substantial damages had the proposed initiative been enacted by voters. *See, e.g.*, R.A. at 253-57 (if passed, the proposed initiative would unconstitutionally impair the Padres' contract rights under the MOU).

Second, the interests of the Padres and the City were in tension with respect to core issues of ballpark construction. For example, the MOU projects the total cost of ballpark construction to be $411 million. *Id.* at 468. Of that sum, the City is to provide $225 million; Padres is to provide $115 million. *Id.* at 475-76. Any ballpark construction cost overruns, however, are to be borne by the Padres. *Id.* at 469. This is the antithesis of a joint venture or a partnership, the essence of which is sharing risks as well as rewards. 59A Am. Jur. 2d *Partnership* § 172, at 239-30 (1987) ("an agreement to share losses as well as profits is essential to the existence of a partnership"); *see also Paul v. Cullum,* 132 U.S. 539, 550-51 (1889). There is thus neither practical nor evidentiary support for the claim in the petition's point heading that the City and Padres' relationship is grounds for finding the Padres' request for declaratory relief was state action.

---

3. Only the point heading of the section actually makes this statement. Petition at 24. The section's text contains no such claim nor does it apply the cited authorities to any evidence in the record. *Id.* at 24-25.

Nor is there legal support for the state action claim. The petition acknowledges that private parties have the right to seek redress of grievances against other private parties. Petition at 24 (citing *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed . . . one aspect of the right of petition")). This right is reflected in the Fourteenth Amendment's dichotomy between state conduct and private conduct which deprives citizens of constitutional rights. *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936 (1982). While such state conduct is constitutionally prohibited, private conduct "'however discriminatory or wrongful'" is not. *Id.* (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974)). The state action requirement "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar*, 457 U.S. at 936. Nothing in the record suggests that limit was approached (let alone breached) because the Padres and City were parties to a negotiated, arms-length contract, however significant its subject. R.A. at 450-51; *see, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (school firing teacher for speech activities was not state action because "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts").

Dunkl's state action claim suffers from yet another defect. The cases on which the petition relies, at 24-25 (citing *Lugar*, 457 U.S. at 941-42, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723-25 (1961), and *Sable Communications of California, Inc. v. Pacific Tel. & Tel. Co.*, 890 F.2d 184, 188-89 (9th Cir. 1989)), address whether the conduct of private parties can be imputed to the state in lawsuits against the state (*Burton*), or whether plaintiffs can pursue claims against private party defendants that require state action as an element (*Lugar, Sable*).

Neither these cases nor any others hold that a private party loses its own First Amendment rights to petition for redress of grievances by entering into an arms-length contract with a public agency. Dunkl's only argument to the contrary purports to apply a balancing test in which his claimed right to circulate a concededly illegal ballot measure trumps the Padres' petition rights. Petition at 25. There is no support in the record or this Court's jurisprudence for such a balancing test. There is no reason to grant the petition to continue with Dunkl's idiosyncratic analysis.

CONCLUSION

For the reasons stated in the City's Brief in Opposition to Petition for Writ of Certiorari and above, respondent Padres, L.P. requests the petition be denied.

Respectfully submitted,

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(4)

Supreme Court, U.S.
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No. 01-136

In The

Supreme Court of the United States

MICHAEL KANE DUNKL and PHILIP ZOEBISCH,

Petitioners,

v.

THE CITY OF SAN DIEGO and SAN DIEGO PADRES,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeal
For The Fourth Appellate District, Division One

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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6 PP

PETITIONERS HAVE CORRECTED THE ERROR LISTING MR. MAILHOT'S NAME IN PLACE OF MR. ZOEBISCH'S NAME AS THE SECOND PETITIONER IN THIS CASE

The City of San Diego correctly notes the error in the title of the Petition, namely, the substitution of Mr. Mailhot's name for that of Mr. Zoebisch. Mr. Mailhot was one of the parties hired to circulate the petition, but it was Philip Zoebisch who was a signatory who, along with Mr. Dunkl, was sued, as all the documents make clear. Mr. Zoebisch is the proper petitioner in this case, along with Mr. Dunkl, and the cover of the Reply To Opposition To Petition For Writ Of Certiorari has been amended accordingly.

PETITIONERS RAISED THE FEDERAL CONSTITUTIONAL ISSUES IN THEIR ANTI-SLAPP MOTION

The City of San Diego argues that Petitioners did not assert their First Amendment rights before the trial court or in their arguments before the Court of Appeal. This assertion is belied by the record. Petitioner's Appendix F sets forth the language of California's SLAPP statute which language constituted the basis for Petitioners' motion before the trial court and a primary focus of Petitioners' appeals. The statute and the cases cited by Petitioners refer specifically to the U.S. Constitution as well as the California Constitution. In short, the California courts were well aware that the First Amendment was at issue.

PETITIONERS PROPERLY CHARACTERIZE THE FACTS AND LAW OF THE CASE

A full briefing will amply demonstrate that Petitioners have properly characterized the facts and law of this case. Nothing cited by the City of San Diego nor by its joint business partner in their opposition briefs take away from the fundamental constitutional question presented in this case, namely, the chilling effect of lawsuits filed against circulators of a petition during the circulation period.

PETITIONERS ATTACHED ALL REQUIRED DOCUMENTS

All relevant documents are before the court. The issues in this case involve questions of law, not fact, and so the only relevant legal decision is that of the Court of Appeal, attached as Petitioners' Appendix B.

THE APPELLATE COURT DECISION CONFLICTS WITH BOTH CALIFORNIA AND FEDERAL CONSTITUTIONAL DECISIONS AS WELL AS THE U.S. CONSTITUTION

Neither Petitioners nor Respondents cite any case on point directly examining the question presented by this petition. However, Petitioners cite case law that by analogy readily supports their argument. Strictly speaking, the question presented may be one of first impression;

but the law is so clear that there is no need to wait for additional judicial review by other or lower courts.

THE PETITION IS NOT MOOT

This case is not moot. In the event the Petitioners' writ is granted and the decision of the Court of Appeal reversed under California's anti-SLAPP statute, the petition in issue can be recirculated since the legislative action affected by it remains operative and subject to amendment by initiative.

PETITIONERS DID NOT WAIVE THEIR CONSTITUTIONAL RIGHTS

The Padres argue that Section 8 of the proposed initiative (Petitioners' Appendix D, page A-48) constitutes a waiver by Petitioners of their constitutional rights. Since the provision is not operative until the initiative was adopted by the voters, it is not relevant to the circulation period. Since the condition has yet to occur, the provision has no present force or effect. By analogy, the Padres would have the court believe that an offer to waive Fifth Amendment rights in return for immunity from prosecution would operate as a waiver without regard to the condition precedent.

PRIVATE PARTIES MAY NOT UTILIZE THEIR ACCESS TO THE COURTS TO CHILL THE RIGHTS OF OTHERS TO PETITION GOVERNMENT WHERE ALTERNATIVE REMEDIES ARE READILY AVAILABLE

The Padres argue that the rule sought to be enforced by Petitioners would unlawfully impinge upon the constitutional rights of the Padres to seek judicial redress.

The issue in this case does involve competing rights, but what is decisive is the availability to the Padres of adequate, traditional alternatives. The standard remedy in California has been for private parties objecting to the legality of citizen initiatives to sue the appropriate elections officer and legislative body in order to obtain relief. By naming circulators as real parties in interest, no judicial relief is sought against the circulators themselves, rather the circulators are merely provided the opportunity to defend the legality of the petition.

While the question of whether Petitioners can even be named as real parties in interest in a lawsuit filed during the circulation period of an initiative petition is not presented to the court by the facts of this case, the Padres fail to make any argument that would suggest that the standard alternative of suing the relevant election officer and legislative body would not provide an adequate remedy to any wrong the Padres allege.

CONCLUSION

The chilling effect on petitioning in this case is as obvious as it is pernicious. The decision of the California courts complained of by Petitioners, like most cancers, is best dealt with immediately. Perhaps other courts will remedy the problem, but why wait and so risk that possibility that this First Amendment violation will grow and metastasize?

Adequate, simple legal alternatives exist that avoid the constitutional problem. There is no good reason to leave to tomorrow that which should be done today. The petition should, therefore, be granted.

Respectfully submitted,

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